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Supreme Court of the United States

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER,

vs.

NEW JERSEY WOOD FINISHING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 17, 1964
CERTIORARI GRANTED OCTOBER 19, 1964

No. 291

Office-Supreme Court, U.S.
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JUL 17 1961
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IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Appeal No. 14,487

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff-Appellee,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Appellant,

and ESSEX WIRE CORP.,
Defendant.

IN A PRIVATE ACTION UNDER THE ANTITRUST LAWS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, APPEAL, PURSUANT TO LEAVE, FROM AN INTERLOCUTORY ORDER DENYING MOTION FOR DISMISSAL OF COMPLAINT OR FOR SUMMARY JUDGMENT (HON. ANTHONY T. AUGELLI, U. S. D. J.).

APPENDIX TO DEFENDANT-APPELLANT'S BRIEF

CHARLES C. TRELEASE,
Attorney for Defendant-Appellant,
744 Broad Street,
Newark 2, New Jersey.

SIDNEY P. HOWELL, JR.,
EDWIN E. McAMIS,
REGAN GOLDFARB POWELL & QUINN,
230 Park Avenue,
New York, New York.

THOMAS J. LYONS,
2501 Hudson Road,
St. Paul, Minnesota,
Of Counsel.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff,
vs.
MINNESOTA MINING AND MANUFACTURING COMPANY
and
ESSEX WIRE CORP.,
Defendants.

Civil Docket No. 964-61

Docket Entries

11–21–61	Complaint filed 11-20-61.
11–21–61	Summons issued.
11–21–61	Notice of Allocation and Assignment (Newark-Augelli) filed.
12– 6–61	Summons returned served on Irvington Varnish and Insulator Co. on 11-27-61; served on Minnesota Mining & Mfg. Co., Essex Wire Corp., Insulation and Wires, Inc. on 11-30-61, filed.
12–19–61	Stipulation and order extending time of Essex Wire Corp., to answer to 2-19-62, filed 12-18-61. (Augelli). Notice mailed.
12–20–61	Stipulation and order extending time of Minnesota Mining and Mfg. Co. to answer to 1-19-62, filed 12-19-61. (Augelli) Notice mailed.
1–22–62	Stipulation and order extending time of Minnesota Mining and Manufacturing Co., and Irvington Varnish and Insulator Co., to answer to 2-19-62, filed 1-19-62 (Augelli) Notice mailed.

Docket Entries

1-24-62	Notice of Minnesota Mining and Manufacturing Company to take depositions of Harold Wetterburg, et als filed 1-23-62.
2- 7-62	Stipulation and order postponing time and place to take depositions of Harold Wetterburg, et als; extending time to answer, filed 2-6-62 (Augelli) Notice mailed.
11-13-62	Notice of call for dismissal under Gen. Rule 12, returnable 12-10-62 filed. Notice mailed.
11-27-62	Notice of dismissal as to the defendant, Irvington Varnish and Insulator Co., filed 11-26-62.
12-11-62	Hearing on call for dismissal under General Rule 12. Ordered motion denied. (Augelli) (12-10-62).
12-12-62	Plaintiff's demand for trial by jury filed 12-11-62.
12-12-62	Plaintiff's motion to compel Minnesota Mining and Manufacturing Company to produce documents, plaintiff's motion to compel Essex Wire Corp., to produce documents, notice returnable 1-14-63 and acknowledgments of service filed 12-11-62 (No brief submitted).
12-19-62	Motions of Minnesota Mining and Manufacturing Company for dismissal or for summary judgment; or in the alternative to strike portions of complaint, etc., notice returnable 1-14-63 and acknowledgments of service filed 12-18-62. (Brief submitted).
12-20-62	Notice of motion by Essex Wire Corporation for summary judgment dismissing plaintiff's complaint; deferring the time to answer plaintiff's interrogatories and motions for the production of documents; sustaining certain objections to plaintiff's interrogatories, etc.; and affidavit of service, filed 12-19-62 (Brief submitted) (ret. 1-14-63).

Docket Entries

1–24–63	Deposition of Harold Wetterberg, filed 1-23-63.
1–28–63	Stipulation and order adjourning hearings on defendants' motions for summary judgment dismissing plaintiff's complaint; etc., to 2-11-63, filed 1-25-63 (Augelli) Notice mailed.
1–29–63	Stipulation and Order extending time of defendants to answer interrogatories until ten days after entry of final order on motions of defendants for summary judgment filed 1-28-63. (Augelli) Notice mailed.
2– 8–63	Deposition of Henry K. Parsons, filed.
2–14–63	Hearing on motions of Minnesota Mining and Manufacturing Co., for dismissal or for summary judgment; or in the alternative, to strike portions of complaint, etc. Ordered motion granted in part and denied in part.
	Ordered motion of M. M. & M. Co. for dismissal continued to March 11, 1963.
	Ordered plaintiff may amend complaint within 30 days. (Augelli) (2-11-63).
2–14–63	Hearing on motion by Essex Wire Corp., for summary judgment dismissing plaintiff's complaint; deferring the time to answer plaintiff's interrogatories and motions for production of documents; sustaining certain objections to plaintiff's interrogatories. Ordered motion granted in part and denied in part.
	Ordered plaintiff may amend complaint within 30 days. (Augelli) (2-11-63).
3–13–63	Plaintiff's notice of motion to settle form or order re amended complaint, etc., returnable 3-25-63 and affidavit of service filed. (No brief).

Docket Entries

3-20-63	*Amended Complaint* and acknowledgment of service, filed 3-19-63.
3-26-63	Continued hearing on motion of Minnesota Mining and Mfg. Co. for dismissal. Decision reserved. (Augelli) (3-25-63).
3-26-63	Hearing on plaintiff's motion to settle form of order re amended complaint, etc. Order to be submitted. (Augelli) (3-25-63).
4-17-63	Order dismissing plaintiff's claim for relief against Essex Wire Corp. for violation of Section 7 of Clayton Act; granting plaintiff leave to amend complaint, etc., filed 4-15-63 (Augelli) Notice mailed.
4-19-63	Transcript of hearings held on March 25, 1963, filed 4-18-63.
4-22-63	Opinion, filed 4-19-63 (Augelli) (denying motion for dismissal, etc.)
4-22-63	Order denying defendant's motion to dismiss the complaint, or in the alternative, for a summary judgment; etc., filed 4-19-63 (Augelli) Notice mailed.
5-13-63	Certified copy of order from U. S. C. A. permitting appeal, filed.
5-17-63	Notice of appeal by defendant, Minnesota Mining and Manufacturing Co., filed 5-16-63.
5-17-63	Bond on Appeal, filed 5-16-63.
5-17-63	Copies of notice of appeal forwarded to Clerk, U. S. C. A., Lowenstein, & Spicer, Esqs., and Hannoch, Weisman, Myers, Stern & Besser, Esqs.
5-27-63	Transcript of hearings held on Feb. 11, 1963, filed 5-24-63.

Complaint

(Filed November 20, 1961)

Plaintiff brings this civil action under the Anti-Trust Laws of the United States, specifically under Sections 4, 7 and 16 of the Act of Congress of October 15, 1914 entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes", as amended and supplemented, (15 U. S. C. A. 15, 18 and 26) commonly known as the Clayton Act, and Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", (15 U. S. C. A. 1 and 2) commonly known as the Sherman Anti-Trust Act. Plaintiff complains and alleges as follows:

1. Plaintiff is a corporation organized under the laws of the State of New Jersey, having its principal place of business at Woodbridge, New Jersey. At all times herein under consideration, plaintiff was and still is engaged in the manufacture of electrical insulation products used in electric motors, transformers, cables, generators and appliances, selling and distributing its products throughout the United States by means of independent distributors.

2. All defendants are corporations which maintain offices, transact business and are found in the State of New Jersey. The defendant Minnesota Mining and Manufacturing Company (hereinafter referred to as M. M. M.), is a Delaware corporation with its principal place of business in St. Paul, Minnesota. For many years prior to 1953, M. M. M. has been a highly diversified manufacturing company, with property and facilities throughout the United States. Among its products were electrical insulation tapes of which it was the nation's leading manufacturer.

During the years 1952-1956, M. M. M. engaged in a pattern of corporate acquisitions in the electrical insulation field, extending from the manufacture and distribution of electrical insulation tape to manufacture and distribution

of other electrical insulation products. Among these acquisitions, M. M. M. obtained control of defendant Irvington Varnish and Insulator Co. (hereinafter referred to as Irvington Varnish), a New Jersey corporation, now a division of M. M. M. with manufacturing facilities at Freehold, New Jersey. Irvington Varnish at all times herein under consideration was and still is a leading manufacturer and seller of electrical insulation products, and in direct competition with plaintiff.

Additionally, in or about August, 1956, the defendant M. M. M. acquired the principal assets of the defendant Insulation and Wires, Inc., a nationwide distributor of electrical insulation products upon whom the plaintiff had continuously, primarily and successfully relied to purchase, resell and distribute plaintiff's products.

Prior to August 1956, Insulation and Wires, Inc. (hereinafter referred to as I. W. I.) had been wholly owned by the defendant, Essex Wire Corp. (hereinafter referred to as Essex Wire), a Michigan corporation. The defendant Essex Wire, at all times herein under consideration, was and still is a purchaser of a substantial volume of electrical insulation products, with much of its purchasing done from or through I. W. I.

At all times herein under consideration, I. W. I. was and still is a distributor of electrical insulation products, distributing through a national network, I. W. I. sales offices being located throughout the United States, including Newark, New Jersey; Boston, Mass.; Detroit, Michigan; St. Louis, Missouri; Houston, Texas; Los Angeles and San Francisco, California; Portland, Oregon; and Atlanta, Georgia. Until its acquisition by M. M. M., I. W. I. distributed said products for manufacturers other than a parent, subsidiary or affiliate. In 1956, I. W. I.'s total sales volume of $3,601,000 made it the third largest distributor of electrical insulation products in the United States with a share of the national market of 6% compared to the nation's largest distributor's share of 19%.

By means of its acquisitions in the electrical insulation field, M. M. M. became the largest manufacturer and distributor of electrical insulation products in the United States, and directly competitive with plaintiff.

3. Beginning in or about August, 1956 and continuing until the date of the filing of this complaint, defendants have unlawfully contracted, combined and conspired to restrain trade in the manufacture, sale and distribution of electrical insulation products, in interstate commerce, in violation of Section 1 of the Sherman Act, by integrating control over the manufacture, sale and distribution of such products in one entity.

4. For the purpose of carrying out the aforesaid unlawful contracts, combinations and conspiracies defendants have done and have continued to do, until the date of the filing of this complaint, the following unlawful acts:

(a) M. M. M. acquired the principal assets of I. W. I. from Essex Wire.

(b) M. M. M. exercises control over I. W. I. whereby I. W. I. refuses to distribute electrical insulation products manufactured by plaintiff.

(c) M. M. M. exercises control over I. W. I. whereby I. W. I. purchases for stock or re-sale, electrical insulation products from Irvington Varnish to the exclusion of products manufactured by plaintiff.

(d) M. M. M. exercises control over I. W. I. whereby I. W. I. ties the sale to customers of certain electrical insulation products manufactured by M. M. M. to the sale of other such products made by M. M. M. and its subsidiaries.

(e) M. M. M. has arranged with Essex Wire for Essex Wire to purchase its requirements of electrical insulation products from I. W. I., to the complete and systematic exclusion of competitive distributors engaged by plaintiff to sell its products.

5. By the aforesaid unlawful and continuing contracts, combinations, conspiracies and acts, defendants have attempted to monopolize trade in the manufacture, sale and distribution of electrical insulation products in interstate commerce, in violation of Section 2 of the Sherman Act.

6. By the aforesaid acquisition of I. W. I., M. M. M. has directly violated Section 7 of the Clayton Act.

7. The effect on plaintiff of the above mentioned violations of the Anti-Trust Laws has been and is to disrupt plaintiff's pattern of manufacture, sale and distribution, and to foreclose to plaintiff, a substantial portion of the national market for electrical insulation products and to cause plaintiff to lose the business and goodwill of numerous customers, whereby plaintiff has suffered and continues to suffer injury and damage to its business and property.

8. Plaintiff, throughout the entire period during which the aforesaid activities have been carried on by defendants has remained ready and willing to manufacture and sell in the manner required by competition.

9. In July, 1961, in Docket No. 7973, *In the Matter of Minnesota Mining and Manufacturing Company,* The Federal Trade Commission entered into a "consent order to divest and to cease and desist" with M. M. M. based upon a complaint against said defendant made by the F. T. C. in June, 1960; the terms of which order require M. M. M. to divest itself of all assets of I. W. I. as to restore I. W. I. as a competitive entity, on or prior to January 1, 1962.

10. Unless a temporary restraining order is issued by the court, defendants will continue to act in the aforesaid unlawful manner, to plaintiff's detriment. If such a temporory restraining order is issued, no harm will result to defendants, as the F. T. C. as aforesaid, has already ordered M. M. M. to restore I. W. I. as a competitive entity, with which order M. M. M. has not yet complied.

WHEREFORE, plaintiff demands:

1. There be issued a temporary restraining order and preliminary injunction of the court directing defendants to terminate their unlawful contracts, combinations and conspiracies, and unlawful acts, and after trial, said injunction be made permanent.

2. A decree be issued by this court ascertaining damages suffered by plaintiff by reason of defendants' unlawful acts above complained of and awarding a judgment in favor of plaintiff and against defendants in the amount of thrice the damages.

3. That the plaintiff be awarded the costs of this action and defendants be directed to pay them.

4. That plaintiff be awarded attorneys' fees in an amount determined by this court to be reasonable and that defendants be directed to pay such amount.

5. That the plaintiff have such further relief as the court may direct.

HANNOCH, WEISMAN, MYERS, STERN & BESSER
Attorneys for Plaintiff

By ALBERT G. BESSER

Albert G. Besser
For the Firm

On Motion
Notice of Motions

(Filed December 18, 1962.)

To:

HANNOCH, WEISMAN, MYERS, STERN AND BESSER, ESQS.
Attorneys for Plaintiff
744 Broad Street
Newark 2, New Jersey

LOWENSTEIN & SPICER, ESQS.
Attorneys for Defendant,
Essex Wire Corporation
744 Broad Street
Newark 2, New Jersey

TAKE NOTICE That on Monday, January 14, 1963, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, we shall move the annexed Motions before the Honorable Anthony T. Augelli, Judge at the United States District Court for the District of New Jersey, or such other judge thereof as may then be sitting to hear motions in this matter, at the appropriate court room in the Federal Building, Newark, New Jersey; and

TAKE FURTHER NOTICE That said Motions may be supported, in part, by the depositions in this suit, taken on behalf of this defendant, of Henry K. Parsons, vice president of plaintiff, and Harold Wetterberg, president thereof, together with the exhibits produced by said witnesses on said examinations and marked for identification in the course thereof.

Dated: December 14, 1962.

CHARLES C. TRELEASE
(Charles C. Trelease)
Attorney for Defendant,
Minnesota Mining and Manufacturing Company
744 Broad Street
Newark 2, New Jersey

Motion of Defendant Minnesota Mining and Manufacturing Company

Of Counsel:

SIDNEY P. HOWELL, JR.
EDWIN E. MCAMIS
and
REGAN-GOLDFARB POWELL & QUINN
of New York City, N. Y.

THOMAS J. LYONS
of St. Paul, Minnesota

On Motion

Motion of Defendant Minnesota Mining and Manufacturing Company

(Filed December 18, 1962.)

Defendant, Minnesota Mining and Manufacturing Company, hereby moves as follows:

1. That the complaint herein be dismissed pursuant to Rule 12(b) for failure to state a claim upon which relief can be granted or that summary judgment in favor of this defendant against the plaintiff be entered pursuant to Rule 56(b), in that, in either case as appears by the complaint, such cause of action as plaintiff may have had against this defendant accrued more than four years before commencement of this action and, accordingly, this action was and is barred by the applicable statute of limitations; to wit, 15 U. S. C. A., Sec. 15(b), 69 Stat. 283, being Section 4(b) of the Clayton Act, as amended;

Motion of Defendant Minnesota Mining and Manufacturing Company

2. That, in the alternative and for the reason aforesaid, each and every allegation or reference to Section 7 of the amended Clayton Act presently contained in the complaint and forming any part of plaintiff's claim herein be stricken therefrom, this defendant hereby reserving the right to answer the complaint herein as so modified upon the merits;

3. That paragraph 9 of the complaint herein be stricken pursuant to Rule 12(f) as immaterial, impertinent and prejudicial, the allegations therein being to a proceeding not encompassed by the provisions of 15 U. S. C. A., Sec. 16, being Section 5 of the Clayton Act, as amended, and the consent order in said proceeding, referred to in said paragraph 9, in any case, being within the proviso of said section; to wit, a consent judgment entered before any testimony had been taken;

4. That, this defendant's time to answer or otherwise move with respect to the Interrogatories directed to this defendant which were served by plaintiff upon this defendant on October 23, 1962, during the course of this defendant's taking of the depositions of members of plaintiff's management be extended for a reasonable time following the completion of the discovery on its part now in progress, or, at all events, for a reasonable time following the Court's ruling on the motions for dismissal and summary judgment herein;

5. That the hearing on plaintiff's motion to compel production of documents by this defendant, noticed for January 14, next, the papers in which were served on this defendant on December 10, be continued to a motion day following the completion of the discovery proceedings on this defendant's part now in progress, or, at all events, follow-

ing the Court's ruling on the motions for dismissal and summary judgment herein.

CHARLES C. TRELEASE
(Charles C. Trelease)
Attorney for Defendant,
Minnesota Mining and Manufacturing Company
744 Broad Street
Newark 2, New Jersey

Of Counsel:

SIDNEY P. HOWELL, JR.
EDWIN E. MCAMIS
and
REGAN GOLDFARB POWELL & QUINN
of New York City, N. Y.

THOMAS J. LYONS
of St. Paul, Minnesota

Defendant's Exhibit 1

Filed February 11, 1963

[EMBLEM]

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

I, Joseph W. Shea, Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that attached is a full, true, and conmplete copy of:

> Complaint, issued June 24, 1960; agreement containing consent order to divest and to cease and desist, with appendix, signed July 19, 1961; initial decision by Hearing Examiner Edgar A. Buttle, filed July 20, 1961; and decision of the Commission and order to file report of compliance, issued August 24, 1961; all in Federal Trade Commission Docket 7973, in the matter of Minnesota Mining and Manufacturing Company.

(SEAL)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Federal Trade Commission to be affixed this 5th day of February, A.D. 1963, at Washington, D.C.

JOSEPH W. SHEA
Secretary.

Defendant's Exhibit 1

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

Docket No. 7973

IN THE MATTER OF:

MINNESOTA MINING & MANUFACTURING COMPANY

COMPLAINT

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF MINNESOTA MINING AND MANUFACTURING COMPANY, a corporation.	Docket No. 7973

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended, hereby issues its complaint pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21), charging as follows:

PARAGRAPH ONE: Respondent Minnesota Mining and Manufacturing Company, hereinafter referred to as Minnesota Mining, is a corporation organized and existing under

Defendant's Exhibit 1

the laws of the State of Delaware with its principal office and place of business located at 900 Bush Street, St. Paul 6, Minnesota.

For a number of years beginning prior to 1953 Minnesota Mining has been a highly diversified company manufacturing and selling a number of product lines and segments thereof including the following: coated abrasives and related products; tapes including cellophane, masking, industrial and electrical; sound-recording magnetic tape; adhesives and coatings; roofing granules; graphic products including reflective, printing and duplicating products; color pigments; sulfuric acid; crushed stone, sand and ready mixed cement; and gummed paper, cloth tapes, and gummed labels. It has been also engaged in leasing and servicing signs for highway advertising. Since 1953 Minnesota Mining has begun the manufacture and sale of reinforced plastics, contact bond adhesives, heat sealable polyester film and certain types of chemical products.

It is the largest manufacturer of magnetic tapes, electrical insulation tapes, pressure sensitive plastic backing including cellophane tapes, and is the largest or one of the largest manufacturers of coated abrasive products, roofing granules, graphic products and highway advertising material.

Minnesota Mining has a world-wide business with properties and facilities throughout the United States and in many foreign countries. It is and has been engaged in the manufacture, sale, and distribution of its products in commerce, as "commerce" is defined in the Clayton Act, throughout the several States of the United States and in the District of Columbia.

Minnesota Mining has branch offices and warehouses in nineteen cities throughout the United States through which primary distribution is made to wholesalers and distributors in a wide-variety of trades. Sales are also made direct to large industrial and other consumers. During the early 1950's it sold its electrical insulation tape through many

distributors and to original equipment manufacturers throughout the United States with the exception of the Eastern Seaboard where its electrical insulation tape was sold directly to consumers.

Minnesota Mining's net sales increased from $108,246,000 in 1948 to $185,242,000 in 1952. During this five year period its net income increased from $13,235,000 to $16,090,000, and its total assets increased from $88,902,000 to $153,275,000. From 1952 to 1956 Minnesota Mining's net sales increased from $185,242,000 to $330,808,000, its net income increased from $16,090,000 to $38,724,000, and its total assets increased from $153,275,000 to $255,084,000.

During the five year period 1952 to 1956 a substantial portion of Minnesota Mining's growth was achieved by 14 acquisitions, 12 domestic and two foreign. Nine of the 12 domestic acquisitions included all the assets of the companies; one was the acquisition of patents; one was an acquisition of a chemical division belonging to another company; and one an acquisition of a research and development partnership. The acquisitions fell into six categories, all of which were related to the existing Minnesota Mining operations. The product groups with the number of acquisitions in each are as follows:

Electrical insulation (6 domestic and 2 foreign companies)	8 acquisitions
Adhesives	1 acquisition
Reinforced plastics	2 acquisitions
Chemicals, including resins	1 acquisition
Paper products (including electrical insulation paper)	1 acquisition
Video recording equipment	1 acquisition

The electrical insulation products of the companies acquired in the electrical insulation industry were complementary to the electrical insulation tape manufactured and sold by Minnesota Mining. The principal electrical in-

sulation product lines acquired were varnished fabrics and paper, manufactured mica, industrial laminates, insulating liquid varnish, extruded plastic tubing, flexible treated tubing and sleeving, and steatite.

In June 1953, Minnesota Mining acquired American Lava Corporation. American Lava Corporation was engaged in the manufacture and sale of steatite ceramic insulation products and other ceramic products throughout the United States. These products were used principally as electrical insulation in radio and television components and household appliances, and as components for textile machinery and processes. At the time of its acquisition American Lava Corporation was the largest producer of steatite. In 1952 American Lava Corporation's net sales were $7,515,000 and its total sales of steatite were $5,204,000. Its sales of steatite for electrical insulation were $3,383,000, and accounted for approximately one third of the total sales of steatite in the electrical insulation industry. Most of its sales were made directly to original equipment manufacturers.

In July 1953, Minnesota Mining acquired Irvington Varnish & Insulator Company, hereinafter referred to as Irvington. Irvington was engaged in the manufacture and sale of electrical insulation (varnished fabrics and paper, flexible treated tubing and sleeving, extruded plastic tubing, and liquid insulation varnish) and certain other products throughout the United States. Prior to its acquisition, Irvington was the largest producer and seller of varnished fabrics and paper, and of extruded plastic tubing for electrical insulation. In 1952 Irvington accounted for approximately two fifths of the total industry sales of varnished fabrics and paper and for approximately one third of the total industry sales of extruded plastic tubing. Its net sales in 1952 were $13,540,000, of which approximately 70 percent was in electrical insulation products. Its sales of electrical insulation products were made to

original equipment manufacturers and to electrical insulation distributors.

In November 1955, Minnesota Mining acquired Mica Insulator Company. Mica Insulator Company was engaged in the manufacture and sale of manufactured mica products, industrial laminated sheets, varnished fabrics and paper for use as electrical insulation, and certain other products throughout the United States. In 1955, Mica Insulator Company was the second largest producer of mica insulation, accounting for approximately 20 percent of total industry sales. In varnished fabrics and paper it was the seventh largest producer with approximately 5 percent of total industry sales in 1955. Its net sales of electrical insulation products in 1955 were $5,672,000. Its sales of electrical insulation products were made to original equipment manufacturers and to electrical insulation distributors.

At the time Mica Insulator Company was acquired by Minnesota Mining it owned 20 percent of the stock of Micanite of Canada, Ltd. and 33⅓ percent of the stock of Samica Corporation. After Mica Insulator Company was acquired, Minnesota Mining purchased the remaining stock of said companies. Samica Corporation was engaged in the manufacture and sale of reconstituted mica sheets used for electrical insulation throughout the United States. The manufacture of reconstituted mica sheets was a relatively new process in 1954, with Samica Corporation being one of the first companies to produce this new product. Sales of mica sheets in 1954 by Samica Corporation were $124,000.

By 1959, Minnesota Mining's net sales had increased to $446,580,000, its net income had increased to $60,262,000, and its total assets had increased to $351,838,000.

PARAGRAPH TWO: In March 1956, Minnesota Mining acquired all of the assets of Prehler Brothers, Incorporated and Prehler Electrical Insulation Company which were

operating as Prehler Electrical Insulation Company, hereinafter referred to as Prehler. Prehler was a corporation organized under the laws of the State of Illinois.

Prehler was engaged in the purchase, sale and distribution of electrical insulation products and other products in commerce, as "commerce" is defined in the Clayton Act. Prehler's principal sales office was located in Chicago, Illinois, and its other sales offices were in the following cities: Cleveland and Dayton, Ohio; Detroit, Michigan; Minneapolis and St. Paul, Minnesota; and Milwaukee, Wisconsin. Prehler sold and distributed electrical insulation products throughout the various sections of eight states, including Minnesota, Wisconsin, Iowa, Illinois, Michigan, Indiana, Ohio and Kentucky and in sections of three other adjacent states.

Prehler purchased substantial amounts of electrical insulation products from Minnesota Mining and other electrical insulation manufacturers. Electrical insulation products sold by Prehler included varnished fabrics and paper, manufactured mica, industrial laminates, insulating liquid varnish, electrical insulation tape, flexible tubing and sleeving and extruded plastic tubing. Its sales were made to original equipment manufacturers and to motor repair and rewind shops in competition with others including Insulation and Wires, Inc.

Prehler was the second largest distributor of electrical insulation products in the United States and in the sections of the country in which it sold electrical insulation products. In 1956 its total sales of all electrical insulation products were $6,471,000 and its total assets amounted to approximately $1,500,000.

PARAGRAPH THREE: In August 1956, Minnesota Mining acquired the principal assets of Insulation and Wires, Inc., hereinafter referred to as IWI, a wholly-owned subsidiary of Essex Wire Corporation. IWI consisted of (1) Insulation and Wires, a Missouri corporation, (2) Insulation and

Wires, a Georgia corporation, and (3) Insulation and Wires, a Division of the Essex Corporation, a Michigan corporation.

IWI was engaged in the purchase, sale and distribution of electrical insulation products and other products in commerce, as "commerce" is defined in the Clayton Act. Its principal office was located at Ft. Wayne, Indiana, and its nine sales offices were located throughout the United States, namely: Newark, New Jersey; Boston, Massachusetts; Detroit, Michigan; St. Louis, Missouri; Houston, Texas; Los Angeles, and San Francisco, California; Portland, Oregon and Atlanta, Georgia.

A substantial amount of IWI's total purchases were electrical insulation products which were purchased from electrical insulation manufacturers. Electrical insulation products sold by IWI included varnished fabrics and paper, manufactured mica, industrial laminates, insulating liquid varnish, electrical insulation tape, flexible tubing and sleeving and extruded plastic tubing. Its principal sales were made to motor repair and rewind shops and original equipment manufacturers in competition with others including Prehler.

IWI was the third largest distributor of electrical insulation products in the United States and one of the few distributors who sold electrical insulation on a nation-wide basis. In 1956, its total sales of all electrical insulation products were $6,126,000, and its total assets amounted to approximately $1,772,000. Its sales of electrical insulation products in the areas in which Prehler did business were over $1,000,000.

PARAGRAPH FOUR: Electrical insulation products are used in electric motors, transformers, generators, electric cables, appliances, and other electrical and electronic equipment. Each of the electrical insulation product lines have approximately 15 to 20 manufacturers and most of these manufacturers are small companies who concentrate their efforts in one product line. Some manufacturers use most

of their electrical insulation products in their own integrated operation. Practically all electrical insulation manufacturers sell electrical insulation products to original equipment manufacturers and to electrical insulation distributors. The electrical insulation distributors in turn sell to original equipment manufacturers and to other classes of customers including motor repair and rewind shops.

Prior to its acquisitions in the electrical insulation industry, Minnesota Mining was the largest producer of electrical insulation tape. It was the first company to develop and sell this product on a commercial basis. As other companies entered this market, Minnesota Mining's market position declined to approximately 84 percent in 1952 and 66 percent in 1958, with sales of $5,112,000 and $4,912,000 respectively.

Minnesota Mining's acquisitions of electrical insulation manufacturers between 1952 and 1956 brought under its control substantial shares of major electrical insulation product lines and made it the largest company in the United States engaged in the manufacture and sale of electrical insulation products to original equipment manufacturers and electrical insulation distributors. These acquisitions included:

(1) In 1955, Irvington and Mica Insulator Company together accounted for approximately 33 percent of the varnished fabrics and paper market. In 1958, their combined sales were approximately 19 percent of the industry's total sales of varnished fabrics and paper and they ranked as the second largest seller.

(2) Irvington was the largest seller of extruded plastic tubing at the time of its acquisition and has continued to hold this market position, accounting for approximately 33 percent of the industry's total sales of extruded plastic tubing.

Defendant's Exhibit 1

(3) Irvington's sales of flexible treated tubing and sleeving has increased from approximately 7 percent of the industry's total sales in 1952 to approximately 11 percent in 1958.

(4) Mica Insulator Company has ranked as the second largest company in the sale of manufactured mica with approximately 20 per cent of total industry sales of this product since 1955.

(5) American Lava Corporation has ranked as the largest company in the sales of steatite, with approximately 33 percent of total industry sales of steatite in 1952 and approximately 28 percent of said sales in 1958.

Minnesota Mining's total net sales of all electrical insulation products were $44,497,000 in 1956 and $40,237,000 in 1958. Its domestic sales of varnished fabrics and paper, manufactured mica, industrial laminates, insulating liquid varnish, electrical insulation tape, extruded plastic tubing, flexible treated tubing and sleeving and steatite were $21,687,000 in 1956 and $15,709,000 in 1958.

Prior to their acquisitions, Prehler and IWI were two of the three largest electrical insulation distributors competing with Minnesota Mining in the sale of electrical insulation products to original equipment manufacturers and others in various sections of the country. Prehler and IWI accounted for approximately 15 percent and 14 percent, respectively, of the total sales of all electrical insulation products sold through electrical insulation distributors in 1956.

With these acquisitions, Minnesota Mining became the largest distributor of electrical insulation products and has continued to hold this market position, accounting for approximately 29 percent of the total sales of all electrical insulation products sold and distributed by electrical insu-

lation distributors in the United States. During the same period of time the sales of the next largest distributor of electrical insulation products declined from approximately 24 percent to approximately 20 percent of said total sales. In 1958, Minnesota Mining's sales of all electrical insulation products through its acquired distributors mounted to $10,665,000.

The acquisitions of Prehler and IWI made Minnesota Mining the second largest distributor of seven of the electrical insulation product lines which it manufactured, accounting for approximately 18 percent of the total sales of said products. In 1958, Minnesota Mining's sales of said seven electrical insulation products through its acquired electrical insulation distributors had increased to about 21 percent of the total sales of said products by electrical insulation distributors, while sales of said seven products by the largest electrical insulation distributor declined to less than 21 percent. In 1958, Minnesota Mining's sales of said seven electrical insulation products through its acquired distributors were $4,820,000.

In 1956, Prehler accounted for approximately 27 percent of the sales of the aforesaid seven electrical insulation products sold by electrical insulation distributors in the sections of the country in which it sold electrical insulation products. In 1958, Prehler's sales of these products accounted for approximately 32 percent of the total sales of these products in said sections of the country.

Prior to the acquisitions of Prehler and IWI a number of electrical insulation manufacturers were suppliers of electrical insulation products to Prehler and IWI. Since the acquisitions many of these suppliers have been discontinued.

Prior to the acquisitions of Prehler and IWI, a number of electrical insulation distributors purchased electrical insulation products for resale from Minnesota Mining and

from the manufacturers of electrical insulation products who were acquired by Minnesota Mining. Since said acquisitions many of these electrical insulation distributors have been foreclosed from purchasing electrical insulation products from Minnesota Mining and its acquired companies.

PARAGRAPH FIVE: The effect of the aforesaid acquisitions by Minnesota Mining of Prehler and IWI, and of each of them, may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution and sale of electric insulation products, individually and collectively, in various sections of the country within the meaning of Section 7 of the Clayton Act as amended.

The aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in the following ways, among others:

1. Minnesota Mining, as the largest producer of electrical insulation tape, and with its acquisitions of leading manufacturers of other electrical insulation products, by acquiring two of the three largest distributors of electrical insulation products in the United States, has extended and integrated its business in such a manner as to substantially increase its position in the manufacture, sale and distribution of electrical insulation products; and it may exercise the inherent powers of its acquired position to substantially lessen competition or tend to create a monopoly in the manufacture, sale and distribution of electrical insulation products.

2. Manufacturers of electrical insulation products have been foreclosed from a substantial share of the markets for said products.

3. Competition has been eliminated between Prehler and IWI in the distribution and sale of elec-

trical insulation products in the sections of the country in which they were competing, and potential competition has been eliminated between said companies throughout the United States.

4. Actual and potential competition has been eliminated between Minnesota Mining and the two acquired distributors.

5. As a leading manufacturer and distributor of electrical insulation products Minnesota Mining has acquired a position whereby it may:

(a) Manipulate prices or use other means to lessen competition or tend to create a monopoly; and

(b) Concentrate the full impact of its sales, promotional and merchandising experience and ability on one of its electrical insulation products, or on one selected section of the country.

6. Concentration of the manufacture, sale and distribution of electrical insulation products may be increased.

PARAGRAPH SIX: The foregoing acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act as amended and approved December 29, 1950.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 24th day of June A. D., 1960, issues its complaint against said respondent.

Defendant's Exhibit 1

NOTICE

Notice is hereby given to the respondent hereinbefore named that the 12th day of September, A. D., 1960, at 10 o'clock is hereby fixed as the time and St. Paul, Minnesota, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Defendant's Exhibit 1

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 24th day of June, 1960.

By the Commission.

SEAL

ROBERT M. PARISH /s/

Robert M. Parish,
Secretary

Defendant's Exhibit 1

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Federal Trade Commission Services Received July 19, 1961

Hearing Examiners

In the Matter of MINNESOTA MINING AND MANUFACTURING COMPANY, a corporation.	Docket No. 7973

AGREEMENT CONTAINING CONSENT ORDER TO DIVEST AND TO CEASE AND DESIST

The agreement herein, by and between Minnesota Mining and Manufacturing Company, a corporation, respondent in Docket No. 7973, hereinafter sometimes referred to as Minnesota Mining, by its duly authorized officers and attorneys, and by counsel supporting complaint, subject to the approval of the Bureau of Restraint of Trade, Federal Trade Commission, is entered into in accordance with Section 3.25 of the Rules of Practice and Procedure of the Federal Trade Commission dated March, 1960. In accordance therewith the parties hereby agree that:

1. Respondent Minnesota Mining and Manufacturing Company is a corporation doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 900 Bush Avenue, St. Paul 6, Minnesota.

2. Pursuant to the provisions of Section 7 of the amended Clayton Act, the Federal Trade Commission on June 24, 1960 issued its complaint in this proceeding against respondent and a true copy was thereafter duly served on respondent.

Defendant's Exhibit 1

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties. The parties agree that it is in the public interest that the allegations of the complaint charging that respondent's acquisition of Prehler Electrical Insulation Company violated Section 7 of the amended Clayton Act be dismissed for the reasons set forth in the attached Appendix A, which is made a part of this agreement.

5. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. For the purposes of this agreement, electrical insulation products shall consist of the following sixteen products and any other product, which may be introduced as a replacement, substitution, or improvement on said sixteen

products, which are sold for use by manufacturers of electrical appliances, electrical machinery, electronics apparatus, communication and power cable, and in the repair of motors, generators and transformers.

(1) Varnished fabrics and paper.

(2) Manufactured electrical mica.

(3) Coated electrical sleeving (formerly known as flexible treated tubing and saturated sleeving).

(4) Industrial laminates.

(5) Insulating liquid varnish.

(6) Electrical insulation tape (pressure sensitive).

(7) Extruded plastic tubing.

(8) Steatite.

(9) Polymeric films such as cellulose acetate, polyvinyl chloride, polypropylene, polyethylene, polyester, fluorinated ethylene propylene, and polytetrafluorethylene.

(10) Vulcanized fibre, fish paper, asbestos paper, kraft paper (including condensor tissue), rag paper, and transformer board.

(11) Untreated cotton and glass tapes.

(12) Encapsulating resins and molding compounds—polyester, apoxy, phanellie, alkyds, silicone, waxes, and asphaltic compounds.

(13) Wire enamels.

(14) Natural, butyl, buna, neoprene, and silicone rubber.

(15) Liquid dielectrics for distribution transformers, power transformers, circuit breakers, specialty transformers, and capacitors.

(16) Hardwood slot sticks.

Defendant's Exhibit 1

For the purposes of this agreement an electrical insulation distributor is a firm which purchases a line of electrical insulation products, from manufacturers other than a parent or subsidiary, for stock and resale.

10. The following order to divest and to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

ORDER

I.

IT IS ORDERED that respondent Minnesota Mining and Manufacturing Company, its subsidiaries, officers, directors, agents, representatives and employees, shall:

1. On or before January 1, 1962, divest itself absolutely, in good faith, as a unit by sale to a purchaser approved by the Commission of all assets, properties, rights and privileges, including but not limited to all trade-marks, trade names, customer lists, contracts, business and good will acquired by respondent as a result of its acquisition of all of the assets of Insulation and Wires division of the Essex Wire Corporation, and all of the assets of Insulation and Wires Incorporated, a Missouri corporation, and all of the assets of Insulation and Wires Incorporated, a Georgia corporation (hereinafter collectively referred to as Insulation and Wires and presently operated as a division of respondent), together with the additions and equipment of whatever description that is presently utilized by respondent in its Insulation and Wires division, in such manner as to restore Insulation and Wires as a competitive entity in substantially the same competitive standing it formerly

had in the sale and distribution of electrical equipment and electrical insulation products at the time of the acquisition.

2. For a period of five (5) years from the date of divestiture, make available to said purchaser all of the electrical insulation products manufactured by respondent and sold by it to any electrical insulation distributors on the same terms and at the same prices as such products are sold by it to such other distributors.

3. Transfer to said purchaser all sales employees who are presently employed by respondent in its Insulation and Wires division.

II.

IT IS FURTHER ORDERED that in the divestiture of Insulation and Wires by respondent none of the said assets, properties, rights and privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to anyone, who at the time of the divestiture, is an officer, director, employee, or agent of, or otherwise directly or indirecly connected with or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

III.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of this order respondent shall continue in good faith to operate its subsidiary Prehler Electrical Insulation Company as an electrical insulation distributor and shall cause said Company to purchase not less than 22% of its total annual purchases of electrical insulation products from suppliers other than respondent or its subsidiaries.

IV.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date of this order respondent shall cease and desist from acquiring, directly or indirectly, through

subsidiaries or otherwise, the assets, stock, or any equity in any electrical insulation distributor in the United States.

V.

IT IS FURTHER ORDERED that, except for the restrictions set forth in Paragraph III of this order, the allegations of the complaint charging that respondent's acquisition of Prehler Electrical Insulation Company violated Section 7 of the amended Clayton Act be dismissed.

Signed this 19th day of July, A. D., 1961.

MINNESOTA MINING AND
MANUFACTURING COMPANY,
a corporation.

By ROBERT L. WESTBEE,
Robert L. Westbee,
Vice President.
900 Bush Avenue,
St. Paul 6, Minnesota.

CONNOLLY, TUCKER POST & LYONS,
Connolly, Tucker Post & Lyons,
Attorneys for Respondent.

By ROBERT H. TUCKER,
Robert H. Tucker,

J. WALLACE ADAIR,
J. Wallace Adair,
Counsel Supporting the Complaint.

APPROVED:

JOSEPH E. SHEEHY,
Joseph E. Sheehy,
Director,
Bureau of Restraint
of Trade.

Defendant's Exhibit 1

Federal Trade Commission
Received
Jul 19, 1961
Hearing Examiners

APPENDIX A TO AGREEMENT CONTAINING CONSENT ORDER TO DIVEST AND TO CEASE AND DESIST IN DOCKET 7973

The complaint in this matter charged Minnesota Mining and Manufacturing Company (hereinafter referred to as Minnesota Mining), a manufacturer of a number of varied product lines including certain electrical insulation products, with violations of Section 7 of the amended Clayton Act in connection with its acquisitions of the electrical insulation distributors—Prehler Electrical Insulation Company (hereinafter referred to as Prehler), acquired March 1956, and Insulation and Wires (hereinafter referred to as IWI), acquired August 1956. At the time of these acquisitions Minnesota Mining was engaged in the manufacture of certain electrical insulation products which it sold to electrical insulation distributors and others. Prehler was engaged in the purchase and resale of electrical insulation products principally to original equipment manufacturers in the 5-state area of Illinois, Indiana, Wisconsin, Michigan and Ohio. IWI was engaged in the purchase and resale of electrical insulation products throughout the United States principally to motor repair and rewind shops and to original equipment manufacturers.

This Consent Order will require the complete divestiture by Minnesota Mining of all the assets of IWI. Therefore any actual or potential competition between Prehler and IWI and between Minnesota Mining and IWI which was eliminated by the acquisition of IWI will be restored. The Consent Order also requires that Minnesota Mining, for a period of five (5) years, will make available to IWI all electrical insulation products manufactured and sold by it to any electrical insulation distributor. Thus the purchaser of IWI will be guaranteed a source of supply of these products.

Prior to the acquisition of Prehler by Minnesota Mining, Prehler had been Minnesota Mining's primary source of

distribution of electrical insulation products to original equipment manufacturers in Prehler's trade area. This relationship began in 1932 when Minnesota Mining first entered the electrical insulation business with pressure-sensitive electrical insulation tape. Since that time Minnesota Mining has developed or acquired a number of electrical insulation products which it has made available to Prehler. Minnesota Mining has had a number of technical salesmen covering the Prehler trade area calling on original equipment manufacturers. These Minnesota Mining salesmen cooperated with and augmented the effectiveness of the Prehler organization. Sales developed by this cooperation were credited to Prehler or other Minnesota Mining electrical insulation distributors in accordance with the desire of the original equipment manufacturer. An exception was made with a limited number of large accounts such as General Electric, Westinghouse, Allis-Chalmers and Western Electric. The Prehler sales organizations did not call on these accounts and sales to these accounts were made direct by Minnesota Mining. Among the reasons for these direct sales were:

1. The above corporations purchased from a central buying location.

2. Many of the items were so-called specification products or non-standard sizes which would not normally be stocked by a distributor.

3. They required closer technical help than could be provided by the distributor and looked directly to Minnesota Mining for this assistance.

4. Many of the products sold were developed as a result of cooperative effort between the laboratories of these companies and the laboratory of Minnesota Mining.

At the time of acquisition substantially all of the stock in Prehler was owned by Mr. Henry Prehler. Mr. Prehler,

who has since died, had been in failing health for several years and desired to dispose of the Prehler Company in order to conserve his estate.

Since the acquisition of Prehler it has been operated in substantially the same manner as had been the practice prior to the acquisition. Prehler had 16 salesmen prior to the acquisition and presently has 16 salesmen. Its territorial coverage, its product lines, and its customers are substantially the same as at the time of acquisition. It maintains the same headquarters and branch offices.

The complaint is in error relative to the market position of Prehler, IWI and other electrical insulation distributors prior and subsequent to Prehler's acquisition. These figures were furnished as a result of a misinterpretation of certain questions in a Federal Trade Commission questionnaire. The figures as alleged in the complaint and the correct figures as developed by a comprehensive FTC survey are set forth as follows:

	Date	*Complaint*	*Corrected*
Prehler's sales of all electrical insulation products	1956	$ 6,471,000	$ 5,819,000
Prehler's share of the national market for all electrical insulation products	1956	15%	12%
	1958	—	10%
Prehler's market share in its trade area of the 7 electrical insulation products of which Minnesota Mining is a manufacturer	1956	27%	21%
	1958	32%	20%
IWI's national sales of all electrical insulation products	1956	$ 6,126,000	$ 3,601,000
IWI's sales of all electrical insulation products in the Prehler trade area	1956	$ 1,000,000	$ 500,000

Defendant's Exhibit 1

	Date	Complaint	Corrected
IWI's share of the national market for all electrical insulation products	1956	14%	6%
	1958	—	5%
Largest competing electrical insulation distributor's national market share for all electrical insulation products	1956	24%	19%
	1958	20%	16%
Combined national market share of Prehler and IWI for the 7 electrical insulation products of which Minnesota Mining is a manufacturer	1956	18%	16%
	1958	21%	14%
National market share of the largest competing electrical insulation distributor of the 7 electrical insulation products of which Minnesota Mining is a manufacturer	1958	21%	16%
Combined national sales by IWI and Prehler of the 7 electrical insulation products of which Minnesota Mining is a manufacturer	1958	$ 4,820,000	$ 3,983,000
Combined national sales by IWI and Prehler of all electrical insulation products	1958	$10,665,000	$ 6,358,000*

In order to show the relationship of the acquisitions of Prehler and IWI to Minnesota Mining's manufacturing operations, the complaint sets forth sales and market positions on certain electrical insulation products. The figures relative to Minnesota Mining's share of the electrical insulation manufacturers' market and those of its Irvington division and its Mica Insulator division were incorrect. As

the following table shows, the market position of these acquired manufacturers declined.

	Date	Complaint	Corrected
Irvington's and Mica Insulator's combined national share for varnished fabric and paper	1955	33%	35%
	1958	19%	22%
Irvington's national market share for extruded plastic tubing	1956	33%	33%
	1958	33%	30%
Irvington's national market share for flexible treated tubing and sleeving	1952	7%	6%
	1958	11%	5%
Minnesota Mining's sales of all electrical insulation products	1956	$44,497,000	$33,463,000
	1958	40,237,000	24,313,000
Share of national market	1956		11.9%
	1958		10.2%
Minnesota Mining's sales of eight electrical insulation products	1956	$21,687,000	$20,740,000
	1958	15,709,000	14,669,000
Share of national market	1956		15.2%
	1958		13.4%

* Prehler's sales and market positions shown in this table do not include the sales of electrical insulation products made by respondent's Mica Insulator division which were billed through Prehler in 1958.

In the Prehler trade area Minnesota Mining's share of the total market for the eight electrical insulation products showed a substantial decline of approximately 20% from 1956 to 1958.

	Year	Market Share
Minnesota Mining's market share of eight electrical insulation products in the Prehler trade area	1956	16%
	1958	13%

Defendant's Exhibit 1

Historically Minnesota Mining has had a substantial share of Prehler's electrical insulation business. At the time of the acquisition of Prehler, Minnesota Mining had approximately 78 percent of Prehler's electrical insulation business. Other suppliers accounted for 22 percent of the electrical insulation products which Prehler distributed. Paragraph III of the Consent Order will assure this same percentage for five years for suppliers other than Minnesota Mining. Further, as developed by the FTC survery, there are approximately 38 electrical insulation distributors competing in the Prehler trade area and it is believed that a manufacturer of electrical insulation products can readily find adequate distribution within this area.

Based on investigation since the issuance of the complaint, it appears that no electrical insulation distributor in the Prehler trade area has discontinued business since the date of the acquisition of Prehler. It further appears that at least four new electrical insulation distributors have been established in this trade area since this acquisition.

Most of the testimony which counsel supporting the complaint would rely on to prove the requisite effects at the distributor level of competition would be testimony from electrical insulation distributors outside the Prehler area and would deal primarily with the effects of the IWI acquisition rather than the Prehler acquisition. The requisite adverse effects with regard to the Prehler acquisition cannot be satisfactorily proved statistically or through competitors.

After due consideration of all of the evidence which might be offered in this case and the provisions in the Consent Order assuring that other electrical insulation suppliers shall continue to enjoy the same percentage of Prehler's business as was enjoyed in 1956, it is respectfully submitted that this consent order is in the public interest and should be issued by the Commission.

Defendant's Exhibit 1

Federal Trade Commission
Received
Jul 20, 1961
Records Serve
Secretary J. W. S.

Filed: July 20, 1961

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF MINNESOTA MINING AND MANUFACTURING COMPANY, a corporation.	Docket No. 7973

INITIAL DECISION

Edgar A. Buttle, Hearing Examiner.
J. WALLACE ADAIR, for the Commission.
CONNOLLY, TUCKER, POST & LYONS,
St. Paul, Minnesota, for the
respondent.

On June 24, 1960, the Federal Trade Commission issued its complaint against the above-named respondent charging it with violating the provisions of section 7 of the Clayton Act, as amended. On July 19, 1961, the respondent and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist and to divest in accordance with section 3.25(a) of the Rules of Practice and Procedure of the Commission.

Under the foregoing agreement, the respondent admits the jurisdictional facts alleged in the complaint and agrees, among other things, that the order to cease and desist and to divest there set forth may be entered without further notice and shall have the same force and effect as if en-

tered after a full hearing. The agreement includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith; and recites that the said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, and that it is for settlement purposes only, does not constitute an admission by the respondent that it has violated the law as alleged in the complaint, and that said complaint may be used in construing the terms of the order. The hearing examiner finds that the content of the said agreement meets all the requirements of section 3.25(b) of the Rules of Practice.

Such agreement further provides that the charge that respondent's acquisition of Prehler Electrical Insulation Company violated section 7 of the amended Clayton Act should be dismissed for the reasons set forth in an Appendix A attached thereto.

As also set forth in the aforesaid agreement and for the purposes thereof, electrical insulation products shall consist of the following sixteen products and any other product, which may be introduced as a replacement, substitution, or improvement on said sixteen products, which are sold for use by manufacturers of electrical appliances, electrical machinery, electronics apparatus, communication and power cable, and in the repair of motors, generators and transformers.

(1) Varnished fabrics and paper.

(2) Manufactured electrical mica.

(3) Coated electrical sleeving (formerly known as flexible treated tubing and saturated sleeving).

(4) Industrial laminates.

(5) Insulating liquid varnish.

(6) Electrical insulation tape (pressure sensitive).

(7) Extruded plastic tubing.

(8) Steatite.

(9) Polymeric films such as cellulose acetate, polyvinyl chloride, polypropylene, polyethylene, polyester, fluorinated ethylene propylene, and polytetrafluorethylene.

(10) Vulcanized fibre, fish paper, asbestos paper, kraft paper (including condenser tissue), rag paper, and transformer board.

(11) Untreated cotton and glass tapes.

(12) Encapsulating resins and molding compounds—polyester, epoxy, phenolic alkyds, silicone, waxes, and asphaltic compounds.

(13) Wire enamels.

(14) Natural, butyl, buna, neoprene, and silicone rubber.

(15) Liquid dielectrics for distribution transformers, power transformers, circuit breakers, specialty transformers, and capacitors.

(16) Hardwood slot sticks.

For the further purposes of this agreement an electrical insulation distributor is a firm which purchases a line of electrical insulation products, from manufacturers other than a parent or subsidiary, for stock and resale.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with section 3.21 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order.

Defendant's Exhibit 1

JURISDICTIONAL FINDINGS

1. Respondent Minnesota Mining and Manufacturing Company is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices and place of business located at 900 Bush Avenue, St. Paul, Minnesota.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under section 7 of the Clayton Act, as amended.

ORDER

I.

IT IS ORDERED that respondent Minnesota Mining and Manufacturing Company, its subsidiaries, officers, directors, agents, representatives and employees, shall:

1. On or before January 1, 1962, divest itself absolutely, in good faith, as a unit by sale to a purchaser approved by the Commission of all assets, properties, rights and privileges, including but not limited to all trade-marks, trade names, customer lists, contracts, business and good will acquired by respondent as a result of its acquisition of all of the assets of Insulation and Wires division of the Essex Wire Corporation, and all of the assets of Insulation and Wires Incorporated, a Missouri corporation, and all of the assets of Insulation and Wires Incorporated, a Georgia corporation (hereinafter collectively referred to as Insulation and Wires and presently operated as a division of respondent), together with the additions and equipment of whatever description that is presently utilized by respondent in its Insulation and Wires division, in such manner as to

restore Insulation and Wires as a competitive entity in substantially the same competitive standing it formerly had in the sale and distribution of electrical equipment and electrical insulation products at the time of the acquisition.

2. For a period of five (5) years from the date of divestiture, make available to said purchaser all of the electrical insulation products manufactured by respondent and sold by it to any electrical insulation distributors on the same terms and at the same prices as such products are sold by it to such other distributors.

3. Transfer to said purchaser all sales employees who are presently employed by respondent in its Insulation and Wires division.

II.

IT IS FURTHER ORDERED that in the divestiture of Insulation and Wires by respondent none of the said assets, properties, rights and privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to anyone, who at the time of the divestiture, is an officer, director, employee, or agent of, or otherwise directly or indirectly connected with or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

III.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of this order respondent shall continue in good faith to operate its subsidiary Prehler Electrical Insulation Company as an electrical insulation distributor and shall cause said Company to purchase not less than 22% of its total annual purchases of electrical insulation products from suppliers other than respondent or its subsidiaries.

Defendant's Exhibit 1

IV.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date of this order respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the assets, stock, or any equity in any electrical insulation distributor in the United States.

V.

IT IS FURTHER ORDERED that, except for the restrictions set forth in Paragraph III of this order, the alegations of the complaint charging that respondent's acquisition of Prehler Electrical Insulation Company violated Section 7 of the amended Clayton Act be dismissed.

EDGAR A. BUTTLE,
Edgar A. Buttle,
Hearing Examiner.

July 20, 1961

Defendant's Exhibit 1

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

PAUL RAND DIXON, Chairman
ROBERT T. SECREST
SIGURD ANDERSON
WILLIAM C. KERN
PHILIP ELMAN

In the Matter of MINNESOTA MINING AND MANUFACTURING COMPANY, a corporation.	Docket No. 7973

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE.

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of August, 1961, become the decision of the Commission; and, accordingly:

IT IS ORDERED that the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

By the Commission.

JOSEPH N. KUZEW,
Joseph N. Kuzew,
Acting Secretary.

Issued: August 24, 1961

Amended Complaint

(Filed March 19, 1963)

Plaintiff complains and alleges as follows:

First Count

1. This action is brought under the Anti-Trust Laws of the United States, specifically under Section 4 of the Act of Congress of October 15, 1914 entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes," as amended and supplemented, (15 U. S. C. 15) commonly known as the Clayton Act, and Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," (15 U. S. C., Sections 1 and 2) commonly known as the Sherman Anti-Trust Act, all as hereinafter more fully appears.

2. Plaintiff is a corporation organized under the laws of the State of New Jersey, having its principal place of business at Woodbridge, New Jersey. At all times herein under consideration, plaintiff was and still is engaged in the manufacture of electrical insulation products used in electric motors, transformers, cables, generators and appliances, selling and distributing its products throughout the United States by means of independent distributors.

3. Defendants are corporations which maintain offices, transact business and are found in the State of New Jersey. The defendant Minnesota Mining and Manufacturing Company (hereinafter referred to as "3M"), is a Delaware corporation with its principal place of business in St. Paul, Minnesota. For many years prior to 1953, 3M had been a highly diversified manufacturing company, with property and facilities throughout the United States. Among its products were electrical insulation tapes of which it was the nation's leading manufacturer.

4. During the years 1952-1956, 3M engaged in a pattern of corporate acquisitions in the electrical insulation field, extending from the manufacture and distribution of electrical insulation tape to manufacture and distribution of other electrical insulation products. In these acquisitions, 3M obtained control of Irvington Varnish and Insulator Co. (hereinafter referred to as "Irvington Varnish"), a New Jersey corporation, now a division of 3M with manufacturing facilities at Freehold, New Jersey. Irvington Varnish at all times herein under consideration was and still is a leading manufacturer and seller of electrical insulation products, and in direct competition with plaintiff.

5. Additionally, in or about August, 1956, 3M acquired the principal assets of Insulation and Wires, Inc., a nationwide distributor of electrical insulation products upon which the plaintiff had continuously, primarily and successfully relied for the sale, resale and distribution of plaintiff's products throughout the United States.

6. Prior to August, 1956, Insulation and Wires, Inc. (hereinafter referred to as "I.W.I.") had been wholly owned by the defendant, Essex Wire Corp. (hereinafter referred to as "Essex Wire"), a Michigan corporation. Essex Wire, at all times herein under consideration, was and still is a purchaser of a substantial volume of electrical insulation products, with much of its purchasing done from or through I.W.I.

7. At all times herein under consideration, I.W.I. was and still is a distributor of electrical insulation products, distributing through a national network, I.W.I. sales offices being located throughout the United States, including Newark, New Jersey; Boston, Mass.; Detroit, Michigan; St. Louis, Missouri; Houston, Texas; Los Angeles and San Francisco, California; Portland, Oregon; and Atlanta, Georgia. Until its acquisition by 3M, I.W.I. distributed said products for independent manufacturers, with which

it had no affiliation or relationship. In 1956, I.W.I.'s total sales volume of $3,601,000 made it the third largest distributor of electrical insulation products in the United States with a share of the national market of 6% compared to the nation's largest distributor's share of 19%.

8. By means of its acquisitions in the electrical insulation field, 3M became the largest manufacturer and distributor of electrical insulation products in the United States, and directly competitive with plaintiff.

9. Beginning in or about August, 1956 and continuing until the date of the filing of this complaint, defendants have unlawfully contracted, combined and conspired to restrain trade in the manufacture, sale and distribution of electrical insulation products, in interstate commerce, in violation of Section 1 of the Sherman Act.

10. It was part of the combination and conspiracy and the object and purpose thereof to accomplish the following, among other things:

(a) to integrate control over the production, sale and distribution in interstate commerce of certain electrical insulation products by the sale of the principal assets of I.W.I. from Essex Wire to 3M;

(b) to eliminate and suppress competition in the sale of electrical insulation products in interstate commerce by preventing sale of said products by plaintiff to Essex Wire;

(c) to eliminate and suppress competition in the distribution of electrical insulation products in interstate commerce by preventing I. W. I. from distributing and selling plaintiff's products;

(d) to eliminate I. W. I. as an important and effective distributor of electrical insulation products for other producers, in interstate commerce, prior to any resale of I. W. I. by 3M;

(e) to arrange for an exclusive dealing arrangement between Essex Wire and 3M in respect to 3M's purchase of magnet wire from Essex Wire and Essex Wire's purchase of electrical insulation materials from I. W. I. and 3M.

11. For the purpose of carrying out the aforesaid unlawful contracts, combinations and conspiracies, and in furtherance thereof, defendants have done and continued to do the following acts:

(a) In August, 1956, 3M acquired the principal assets of I. W. I. from Essex Wire, paying only nominal value for the former's good will, although its worth was largely in customer contacts and listings;

(b) Thereafter, in September, 1956, 3M expressly stated to plaintiff that as of January, 1957 I. W. I. would terminate distribution of plaintiff's products, thus severing plaintiff's contact with numerous customers previously reached through I. W. I.

(c) Essex Wire, beginning in 1956 and through 1961, repeatedly directed and instructed its employees, including the plant managers and engineers at its various divisions to purchase electrical insulation materials from either I. W. I. or 3M, and not from plaintiff, (although it had been a substantial purchaser of plaintiff's products in preceding years) all in furtherance of the conspiracy.

(d) In conformity with the conspiracy and in furtherance thereof, during each of the years 1957 through 1961, Essex Wire tendered either no or only token order for plaintiff's products despite repeated, direct and personal solicitation in each of those years by plaintiff, or its agent, Insulation Manufacturers Corp.

(e) Pursuant to the conspiracy, and in order to police and inspect the directions to its personnel to purchase only from I. W. I. or 3M, and not from plaintiff, Essex Wire's Director of Purchases in each of the years 1957 through

1961 ordered divisional personnel to submit to him copies of all invoices for electrical insulation material purchases. Continuously during each year, 1957 through 1961, as ordered, purchase invoices were submitted to and personally inspected by Essex Wire's Director of Purchases at Fort Wayne, Indiana, in order to insure that Essex Wire, pursuant to the conspiracy aforesaid, channelled its purchases of electrical insulation away from plaintiff, and, wherever possible to 3M.

(f) In furtherance of the conspiracy, Essex Wire designated its Director of Purchases to receive complaints and reports from 3M personnel concerning 3M sales efforts at Essex Wire divisions, and individuals in the Essex organization who for practical business reasons were refusing or resisting purchase of 3M materials. Numerous such complaints were received and acted upon between 1957 and 1961. During this same period, Essex Wire's Director of Purchases continuously visited plants throughout the country to eliminate objections to purchasing 3M material and to restrain local Essex Wire personnel from purchasing plaintiff's products.

(g) During the period 1956 through 1961 and in furtherance of the conspiracy to eliminate I. W. I. as an effective distributor of electrical insulation products in the event of resale of I. W. I., 3M obtained, directly and indirectly, from I. W. I. and its sales personnel, customer lists and other confidential information which permitted 3M sales personnel to solicit I. W. I. customers directly and to compete with I. W. I. salesmen. 3M salesmen obtained such confidential information, for example, from the I. W. I. San Francisco office by requiring I. W. I. salesmen to divulge sales and customer details to 3M manufacturing plants prior to having orders filled. This information was then given to 3M sales personnel.

In furtherance of the conspiracy, and at 3M's request, Essex Wire in the years 1959 through 1961 placed orders

for 3M material directly with 3M salesmen instead of I. W. I. salesmen who had previously serviced Essex Wire. Essex Wire so acted, pursuant to the conspiracy, despite objections and pleas by I. W. I. sales personnel.

(h) In 1959, pursuant to the conspiracy, officers and employees of 3M and Essex Wire met in Chicago, Illinois, to discuss an offer by a New York electrical insulation distributor to purchase I. W. I. from 3M. The defendants agreed at that time not to sell I. W. I. but to continue operating I. W. I. under 3M ownership. The conspirators agreed at that time that Essex Wire would thenceforth render 3M greater advice and assistance in operating I. W. I. To eliminate the possibility of a sale to an independent third party, it was also agreed that prospective purchasers of I. W. I. would be warned that in the event of any sale thereof Essex Wire probably would no longer purchase its electrical insulation requirements therefrom.

(i) Thereafter, and for approximately six months in 1959 and from time to time through 1961, Essex Wire assigned to 3M its Director of Purchases, who had formerly been President of I. W. I. At no cost to 3M, Essex Wire's Director of Purchases assisted 3M in the operation and management of I. W. I., all in furtherance of the conspiracy.

(j) In furtherance of the conspiracy, and in return for Essex Wire's participation therein, 3M during the period August, 1956 through 1961, purchased, from time to time, its requirements of magnet wire from Essex Wire. 3M during this period repeatedly acceded to Essex Wire demands that 3M refrain from purchasing magnet wire from Essex Wire's competitors.

(k) Pursuant to the conspiracy, and in furtherance thereof, in 1961, 3M resold I. W. I. to Essex Wire, thus insuring that knowledge of all confidential customer information which it had obtained from I. W. I. would be limited to itself and Essex Wire, which had previously owned

I. W. I. and that such confidential information would not be obtained by a third party.

12. By the aforesaid unlawful and continuing contracts, combinations, conspiracies and acts, defendants have attempted to monopolize trade in the manufacture, sale and distribution of electrical insulation products in interstate commerce, in violation of Section 2 of the Sherman Act.

13. The effect on plaintiff of the above mentioned violations of Sections 1 and 2 of the Sherman Act has been and is to disrupt plaintiff's pattern of manufacture, sale and distribution, and to foreclose to plaintiff, a substantial portion of the national market for electrical insulation products and to cause plaintiff to lose the business and good will of numerous customers, whereby plaintiff has suffered and continues to suffer injury and damage to its business and property.

14. Plaintiff, throughout the entire period during which the aforesaid activities have been carried on by defendants has remained ready and willing to manufacture and sell in the manner required by competition.

15. During the period June, 1960 to August, 1961, a proceeding concerning substantially identical subject matter to that which is here alleged and to which 3M was a party was pending before the Federal Trade Commission in Docket No. 7973 entitled *In the Matter of Minnesota Mining and Manufacturing Company.*

SECOND COUNT

1. This civil action is brought under Sections 4 and 7 of the Clayton Act (15 U. S. C., Sections 15 and 18).

2. Plaintiff repeats the allegations of paragraphs 2, 3. 4, 5, 6, 7, 8, and 15 of the First Count and makes them a part hereof as though set forth at length herein.

3. The effect of the aforesaid acquisition, set forth more particularly in Paragraphs 5, 6, 7 and 8 of the First Count was substantially to lessen competition and to tend to create a monopoly in violation of Section 7 of the Clayton Act.

4. As a result of the aforesaid violation of the Clayton Act plaintiff suffered damage and injury.

WHEREFORE, plaintiff demands on both the First and Second Counts hereof:

1. A decree be issued by this court ascertaining damages suffered by plaintiff by reason of defendants' unlawful acts above complained of and awarding a judgment in favor of plaintiff and against defendants in the amount of thrice the damages.

2. That the plaintiff be awarded the costs of this action and defendants be directed to pay them.

3. That plaintiff be awarded attorneys' fees in an amount determined by this court to be reasonable and that defendants be directed to pay such amount.

4. That the plaintiff have such further relief as the court may direct.

HANNOCH, WEISMAN, MYERS, STERN & BESSER,
Attorneys for Plaintiff

By ALBERT G. BESSER
Albert G. Besser
A Member of the Firm

Dated: March 15, 1963.

On Motions

Order

(Filed: April 15, 1963.)

This matter having come on for hearing before the United States District Court for the District of New Jersey (Honorable Anthony T. Augelli, U. S. D. J.) on February 11, 1963, in the presence of Mr. Sidney P. Howell, Jr., of the New York Bar (associated with Charles C. Trelease, Esq.,) for defendant Minnesota Mining and Manufacturing Company; Mr. Murry D. Brochin (associated with Lowenstein and Spicer, Esqs. for defendant Essex Wire Corporation, and Mr. Albert G. Besser (associated with Hannoch, Weisman, Myers, Stern & Besser, Esqs.) for plaintiff New Jersey Wood Finishing Co., upon the Notice of Motion dated December 14, 1962 of defendant Minnesota Mining and Manufacturing Company; the Notice of Motion of defendant Essex Wire Corporation; and the Stipulation of the parties in that regard dated January 25, 1963; and the Court having considered plaintiff's complaint, the affidavits and excerpts from depositions relied upon by the respective defendants, also the certified copy of the record of proceedings of the Federal Trade Commission against the defendant Minnesota Mining and Manufacturing Company, entitled "In the matter of Minnesota Mining and Manufacturing Company, a corporation", Docket No. 7973, instituted June 24, 1960, together with the briefs and arguments of counsel; and good cause appearing;

It is, therefore, on this 15th day of April, 1963, Nunc Pro Tunc As of February 11, 1963;

ORDERED:

1. The complaint be and the same hereby is dismissed with prejudice as against the defendant Essex Wire Corp. with respect to plaintiff's claim for relief against that defendant for violation of Section 7 of the Clayton Act.

2. Plaintiff is given leave to amend the complaint as against defendant Essex Wire Corp. to allege with the

requisite particularity overt acts in violation of the Sherman Act committed within four years immediately preceding the filing of the complaint in this matter.

3. The motion of defendant Minnesota Mining and Manufacturing Company to strike paragraph 9 of the complaint and so much of paragraph 10 as refers to proceedings before the Federal Trade Commission be and the same hereby is granted, except that plaintiff, in its amended complaint, may allege the institution, pendency and general subject matter of said Federal Trade Commission proceedings in order to permit plaintiff to rely thereon as a bar to the defense of the Statute of Limitations raised by the defendant Minnesota Mining and Manufacturing Company.

4. The motion of defendant Minnesota Mining and Manufacturing Company to dismiss the complaint as against it on the grounds that the complaint fails to state a claim upon which relief can be granted, or, in the alternative, for a summary judgment in its favor based on the four year statute of limitations of the Clayton Act, be and the same hereby is continued until March 25, 1963, and the parties are hereby given leave to file supplementary memoranda on the issue of tolling of the Statute of Limitations applicable to plaintiff's causes of action, if any, against defendant Minnesota Mining and Manufacturing Company because of the aforementioned Federal Trade Commission proceedings.

5. All further pre-trial discovery in this matter be and the same hereby is stayed until the further Order of this Court, which Order shall determine the schedule of further discovery in this matter.

ANTHONY T. AUGELLI

Anthony T. Augelli
U. S. D. J.

Opinion On Motion of Defendant Minnesota Mining and Manufacturing Company For Dismissal of Complaint, etc.

(Filed April 19, 1963.)

APPEARANCES:

HANNOCH, WEISMAN, MYERS, STERN & BESSER, ESQUIRES,

By: ALBERT G. BESSER, HERBERT M. GUSTON and RALPH M. LOWENBACH, ESQUIRES, Attorneys for plaintiff;

CHARLES C. TRELEASE, ESQUIRE, Attorney for defendant Minnesota Mining and Manufacturing Company;

SIDNEY P. HOWELL, JR., ESQUIRE (New York Bar), EDWIN E. MCAMIS, ESQUIRE (New York Bar), THOMAS J. LYONS, ESQUIRE (Minnesota Bar), Of Counsel.

AUGELLI, District Judge:

This is a private action under the antitrust laws of the United States, sections 1 and 2 of the Sherman Act, 15 U. S. C. A. Secs. 1 and 2, and section 7 of the Clayton Act, 15 U. S. C. A. Sec. 18.

Plaintiff, New Jersey Wood Finishing Company, is engaged in the manufacture of electrical insulation products in this State and in the sale and distribution of said products by independent distributors throughout the United States, Defendant Minnesota Mining and Manufacturing Company ("3M") is a diversified nationwide manu-

facturing company, also engaged in the electrical insulation field. Defendant Essex Wire Corp. ("Essex") is a substantial customer for electrical insulation products and, until August 1956, owned and operated Insulation & Wires, Inc.

("IWI"), a national distributor of these products for various manufacturers.

Plaintiff is seeking, in both counts of its amended complaint, to recover treble damages as provided by section 4 of the Clayton Act, 15 U. S. C. A. Sec. 15, for injuries suffered to its business by reason of defendants' alleged unlawful acts. The first count of the complaint charges that since August 1956 defendants have conspired to restrain, and attempted to monopolize, trade in the manufacture, sale and distribution of electrical insulation products in interstate commerce, in violation of sections 1 and 2 of the Sherman Act. Plaintiff pleads a number of acts allegedly carried out by defendants in furtherance of their conspiracy and attempted monopolization, beginning with 3M's acquisition of IWI from Essex in August 1956 and up to the filing of the original complaint in this case on November 20, 1961. The second count alleges that the effect of such acquisition was substantially to lessen competition and to tend to create a monopoly, in violation of section 7 of the Clayton Act. By order of this court filed April 15, 1963, Essex was dismissed as a defendant in count two of the complaint.

Defendant 3M has, by stipulation, deferred filing its answer and moves at this time that the complaint be dismissed, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted; or, in the alternative, that summary

judgment be entered in its favor pursuant to Rule 56(b) of the Federal Rules. The basis for this motion is the four year statute of limitations in section 4b of the Clayton Act, 15 U. S. C. A. Sec. 15b, which provides that "[a]ny action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. * * *"

Opinion On Motion of Defendant Minnesota Mining and Manufacturing Company For Dismissal of Complaint, etc.

This action is admittedly brought under section 15 of Title 15, which is section 4 of the Clayton Act. Therefore, plaintiff can apparently only maintain its cause of action against 3M if such action accrued since November 20, 1957, four years prior to the date the original complaint was filed. Since 3M's acquisition of IWI, which is conceded by the parties to be the main thrust of plaintiff's claim in both counts, took place in August 1956, outside the four year limitation period, 3M argues that plaintiff's causes of action under the Sherman and Clayton Acts are now barred.

Plaintiff contends that even assuming that its cause of action against 3M accrued in August 1956, the running of the statute of limitations was tolled by section 5 (b) of the Clayton Act, 15 U. S. C. A. Sec. 16(b). That section provides as follows:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

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Plaintiff alleges in its complaint that during the period between June 1960 and August 1961, "a proceeding concerning substantially identical subject matter to that which is

here alleged and to which 3M was a party was pending before the Federal Trade Commission in Docket No. 7973 entitled *In the Matter of Minnesota Mining and Manufacturing Company*". 3M, conceding the existence of these proceedings, has filed, as an appendix to its reply brief, a certified copy of the complaint and consent order in the Commission action. These papers make clear that the complaint before the Federal Trade Commission was brought against 3M for alleged violations of section 7 of the Clayton Act in the acquisition of a number of companies in the electrical insulation field. Among the acquisitions by 3M involved in those proceedings was the purchase of IWI from Essex in August 1956. The complaint of the Commission alleged that the effect of these acquisitions, "and of each of them, may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution and sale of electrical insulation products * * * in various sections of the country". This action was ultimately terminated by a consent order whereby 3M agreed to divest itself on or before January 1, 1962 of all the assets of IWI.

The issues involved on this motion concern the applicability of section 5(b) of the Clayton Act to these Commission proceedings. If these proceedings come within the meaning of section 5(b), the running of the statute of limitations would have been tolled against 3M as to any matter complained of therein. Then, the complaint filed in this case on November 20,

1961 would be timely as to any cause of action based on 3M's acquisition of IWI in August 1956, since the action was commenced within one year of the termination of the Commission proceedings.

First. Defendant 3M argues that section 5(b) of the Clayton Act is not operative where, as here, the earlier

proceedings are terminated by consent before any testimony has been taken. This contention is based on section 5 (a) of the Clayton Act, 15 U. S. C. A. Sec. 16(a), which reads as follows:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * *, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *."

3M claims that the proviso in section 5(a), prohibiting the use of a consent judgment as prima facie evidence in a subsequent action, also applies to the tolling provision in section 5(b), and that therefore a proceeding terminated by consent cannot toll the statute of limitations.

This Court is of the opinion that the consent judgment proviso was intended to apply solely to the prima facie evidence provision in section 5(a). The proviso is grammatically a part of the single sentence which comprises section 5(a), separated only by a colon. Section 5(b) is separate and apart, and makes no reference to "judgments or decrees". It is the "pendency" of a "proceeding" that operates to toll the

running of the statute of limitations, and the manner of termination of that proceeding is not a factor under the language of section 5(b).

Opinion On Motion of Defendant Minnesota Mining and Manufacturing Company For Dismissal of Complaint, etc.

Second. Defendant contends that the action brought by the Federal Trade Commission is not a "civil • • • proceeding • • • instituted by the United States to prevent, restrain, or punish violations of • • • the antitrust laws" within the meaning of section 5(b) of the Clayton Act. The argument is that the quoted language refers only to a judicial proceeding brought by the Antitrust Division of the Justice Department, and not to an administrative proceeding instituted by the Federal Trade Commission. 3M points out the well-known distinctions between judicial and administrative proceedings, and conjectures that Congress could not have intended a Commission proceeding to have such an effect without writing more specific language into the statute.

The cases coming to the Court's attention dealing with the tolling question have all involved prior Department of Justice proceedings. There appear to be no decisions as to whether or not section 5(b) is applicable in the case of a Federal Trade Commission proceeding. 3M has cited *Proper* v. *John Bene & Sons, Inc.*, 295 Fed. 729 (E. D. N. Y. 1923), which contains dicta to the effect that a proceeding before the Federal Trade Commission is not brought by the United States under the antitrust laws. But the *Proper* case involved the very different question of the res judicata effect of proceedings under the Federal Trade Commission Act pursuant to the present section 5(a) of the Clayton Act. There certainly can

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be no doubt that a proceeding brought by the Commisison under section 7 of the Clayton Act is an action under the "antitrust laws". See section 1 of the Clayton Act, 15 U. S. C. A. Sec. 12. Nor can there be much doubt today that a Commission proceeding is an action brought by the United States. See *Brunswick-Balke-Collender Co.* v. *American Bowling & Billiard Corp.*, 150 F. 2d 69 (2 Cir. 1945).

In the final analysis, the resolution of the issue of the applicability of the tolling provision in section 5(b) to Commission proceedings depends upon the legislative purposes behind the adoption of that section. It seems clear that Congress intended by section 5(b) to allow antitrust litigants an opportunity, which might otherwise be barred by the four year statute of limitations, to take advantage of facts uncovered in related Government proceedings. See Sen. Rep. 619, 84th Cong., 1st Sess., U. S. Code Cong. & Admin. News, p. 2332 (1955); *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561, 569 (10 Cir. 1962). Thus, a private party which has suffered damages to its business by reason of unlawful antitrust activity is permitted additional time to derive the benefits of a Government investigation. This purpose has nothing whatever to do with the competency of the evidence generated by the Government proceeding, or with which agency prosecuted the violation for the Government.

Both the Federal Trade Commission and the Department of Justice have concurrent jurisdiction over violations of section 7 of the Clayton Act. See section 11 of the Clayton Act, 15 U. S. C. A. Sec. 21. It certainly would seem not to have

been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstance of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding, but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical. Thus, the difference between judicial and administrative proceedings has no meaning in the light of section 5(b)'s purpose to permit a plaintiff to take advantage of facts uncovered during the pendency of a Government proceeding. The Court, therefore, finds that the action before the

Commission is a proceeding within the meaning of section 5(b) of the Clayton Act which tolls the running of the statute of limitations.

Third. The remaining issue concerns the extent to which the complaint filed in this Court is saved by the tolling provision. Concededly, the running of the statute of limitations would be tolled with respect to plaintiff's claim under section 7 of the Clayton Act, based on 3M's acquisition of IWI in August 1956, which was the subject of the Commission proceeding. But plaintiff contends that the statute is also tolled as to its claims of conspiracy and attempt to monopolize under sections 1 and 2 of the Sherman Act.

Section 5(b) of the Clayton Act tolls the statute "in respect of every private right of action arising under [the antitrust] laws and based in whole or in part on any matter complained of in [the Government] proceeding". The Sherman Act claims involved here are, at least "in part", based on the same "matter complained of" in the Com-

mission proceeding. The factual issues, centering around 3M's acquisition of IWI in August 1956 and the consequent effects of such acquisition on competition in the electrical insulation field, appear to be substantially identical in the two proceedings. See *Union Carbide & Carbon Corp.* v. *Nisley, supra,* p. 570. Thus, facts uncovered by the Government in the Commission proceeding would seem to bear on the issues which are involved in this case under sections 1 and 2 of the Sherman Act.

For the reasons stated, this Court holds that section 5(b) of the Clayton Act tolled the running of the statute of limitations as to both the Clayton and Sherman Act counts of the complaint against 3M in this case. Defendant 3M's motion for dismissal, or, in the alternative, for a summary judgment will be denied. Submit order.

On Motions

Order

(Filed April 19, 1963)

This matter having come on for hearing before the United States District Court for the District of New Jersey (Honorable Anthony T. Augelli, U. S. D. J.) on March 25, 1963, in the presence of Mr. Sidney P. Howell, Jr. of the New York Bar (associated with Charles C. Trelease, Esq.,) for defendant Minnesota Mining and Manufacturing Company; Mr. Murry D. Brochin (associated with Lowenstein and Spicer, Esqs.) for defendant Essex Wire Corporation, and Mr. Albert G. Besser (associated with Hannoch, Weisman, Myers, Stern & Besser, Esqs.) for plaintiff New Jersey Wood Finishing Co., upon the Notice of Motion dated December 14, 1962 of defendant Minnesota Mining and Manufacturing Company; the Notice of Motion of defendant Essex Wire Corporation; and the Stipulation of the parties in that regard dated Jaunary 25, 1963; and the Court having considered plaintiff's complaint, the affidavits and excerpts from depositions relied upon by the respective defendants, also the certified copy of the record of proceedings of the Federal Trade Commission against the defendant Minnesota Mining and Manufacturing Company, entitled "In the matter of Minnesota Mining and Manufacturing Company, a corporation", Docket No. 7973, instituted June 24, 1960, together with the briefs and arguments of counsel; and good cause appearing;

It is, therefore, on this 19th day of April, 1963,

ORDERED:

1. The motion of defendant Minnesota Mining and Manufacturing Company (continued from February 11, 1963) to dismiss the complaint as against it on the ground that it fails to state a claim upon which relief can be granted, or, in the alternative, for a summary judgment in its favor based on the four year statute of limitations of

the Clayton Act, be and the same hereby is denied because of the Court's conclusion that the Statute of Limitations was tolled in regard to both the alleged Clayton Act and Sherman Act violations committed by Minnesota Mining and Manufacturing Company by the aforementioned Federal Trade Commission proceeding against defendant Minnesota Mining and Manufacturing Company.

2. This Order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal by defendant Minnesota Mining and Manufacturing Company from this Order may materially advance the ultimate termination of this litigation.

3. In the event that application is made for leave to appeal from this Order, all proceedings in this matter are to be stayed pending the outcome of such application. If leave to appeal is granted, said stay is to continue until the appeal is decided and until the further Order of this Court.

4. The motions of defendant Minnesota Mining and Manufacturing Company and this Court's rulings thereon shall be deemed to extend to the amended complaint filed herein on March 19, 1963.

ANTHONY T. AUGELLI

Anthony T. Augelli, U. S. D. J.

On Motion

Notice of Appeal

(Filed May 16, 1963)

Notice is hereby given that, pursuant to an Order of the United States Court of Appeals for the Third Circuit, dated May 9, 1963, granting permission for such appeal, Minnesota Mining and Manufacturing Company, one of the defendants above named, hereby appeals to said United States Court of Appeals for the Third Circuit from Paragraph 1 of the Order of the United States District Court for the District of New Jersey (Hon. Anthony T. Augelli, D.J.) entered April 19, 1963, denying said defendant's motion in that Court based upon the Statute of Limitations governing antitrust actions as provided by Section 4B of the Clayton Act as amended, 15 U. S. C. Sec. 15b.

Dated: May 16, 1963

CHARLES C. TRELEASE
(Charles C. Trelease)
Attorney for Defendant-Appellant
Minnesota Mining and Manufacturing
Company
744 Broad Street,
Newark 2, N. J.

[fol. 63]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,487

NEW JERSEY WOOD FINISHING COMPANY, Plaintiff-Appellee,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Appellant,

and ESSEX WIRE CORP., Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 10, 1963

Before BIGGS, *Chief Judge*, and McLAUGHLIN and HASTIE, *Circuit Judges*.

OPINION OF THE COURT—Filed May 20, 1964

By McLAUGHLIN, *Circuit Judge*.

This is an interlocutory appeal under 28 U.S.C. Section 1292(b) from a denial of a defense motion to dismiss based on the statute of limitations.

Plaintiff-appellee is the New Jersey Wood Finishing Company (N. J. Wood), a New Jersey corporation engaged in the manufacture of certain electrical insulation [fol. 64] products. Defendant-appellant is the Minnesota Mining and Manufacturing Company (3M), a Delaware Corporation, doing business in New Jersey and likewise engaged in the electrical insulation field.

On June 24, 1960, the Federal Trade Commission (FTC) had issued a complaint against 3M, charging that 3M "has violated and is now violating the provisions of Section 7

of the Clayton Act (U.S.C. Title 15, Section 18) as amended, * * *." That FTC complaint substantially alleged the following:

For a number of years prior to 1953, 3M was a highly diversified company, manufacturing and selling a number of product lines and segments thereof. From 1952 to 1956, 3M began to acquire the operations of a number of manufacturers and various product groups, particularly in the electrical insulation field. During this period it also bought several distributor companies. In March 1956, 3M absorbed Prehler Companies, the second largest distributor (15% of sales) of electrical insulation products in the United States, and in August 1956, it absorbed Insulation and Wires, Inc. (IWI), the third largest such distributor (14% of sales). After obtaining these corporations, 3M became the largest such distributor, having around 29% of the total sales of electrical insulation products sold and distributed by electrical instrument distributors in the United States.

By these acquisitions, 3M further became the second largest distributor of seven (7) of the electrical insulation products it manufactured and had 18% of the total sales of these products. In 1958 3M's sales of these products through its acquired distributors, increased to about 21% of the total sales of said products, while the sale of those seven products by the largest electrical insulation distributor decreased to less than 21%.

By virtue of 3M's acquisition of these distributor corporations, other manufacturers who had previously dealt with Prehler and IWI found this market closed to them. [fol. 65] Similarly other distributors, who had been supplied with products by 3M and the other manufacturers 3M acquired, found this source of supply cut off.

The FTC complaint asserted that the effect of the acquisitions of Prehler and IWI, and of each of them, by 3M may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution, and sale of electrical insulation products, individually and collectively in various sections of the country within the

meaning of Section 7 of the Clayton Act as amended. The complaint thereafter specified these injurious effects.[1]

The FTC complaint concluded by charging that:

"The foregoing acquisitions, acts and practices of respondent, * * * constitute a violation of Section 7 of the Clayton Act as amended and approved December 29, 1950:

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[1] The aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in the following ways, among others:

1. Minnesota Mining, as the largest producer of electrical insulation tape, and with its acquisitions of leading manufacturers of other electrical insulation products, by acquiring two of the three largest distributors of electrical insulation products in the United States, has extended and integrated its business in such a manner as to substantially increase its position in the manufacture, sale and distribution of electrical insulation products; and it may exercise the inherent powers of its acquired position to substantially lessen competition or tend to create a monopoly in the manufacture, sale and distribution of electrical insulation products.

2. Manufacturers of electrical insulation products have been foreclosed from a substantial share of the markets for said products.

3. Competition has been eliminated between Prehler and IWI in the distribution and sale of electrical insulation products in the sections of the country in which they were competing, and potential competition has been eliminated between said companies throughout the United States.

4. Actual and potential competition has been eliminated between Minnesota Mining and the two acquired distributors.

5. As a leading manufacturer and distributor of electrical insulation products Minnesota Mining has acquired a position whereby it may:

(a) Manipulate prices or use other means to lessen competition or tend to create a monopoly; and

(b) Concentrate the full impact of its sales, promotional and merchandising experience and ability on one of its electrical insulation products, or on one selected section of the country.

6. Concentration of the manufacture, sale and distribution of electrical insulation products may be increased.

[fol. 66] "WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 24th day of June, A.D. 1960 issues its complaint against said respondent."

Apparently before any testimony was taken, this FTC proceeding was terminated by consent order entered July 20, 1961, under which 3M was ordered inter alia to divest itself absolutely of all the assets of Insulation and Wires Division (IWI) of the Essex Wire Corporation and its related corporations.

On November 20, 1961, N. J. Wood filed its complaint in this action alleging that 3M had violated Section 1 and Section 2 of the Sherman Act (15 U.S.C. Sections 1, 2 (1958)) and Section 7 of the Clayton Act (15 U.S.C. 18 (1958)) to its (N. J. Wood's) injury, for which under Section 4 of the Clayton Act (15 U.S.C. 15 (1958)) it was entitled to treble damages. N. J. Wood claimed that 3M had acquired IWI in violation of these antitrust statutes and deprived it of a substantial national market for its products.

3M moved to strike N. J. Wood's complaint because the cause of action accrued more than four years before the commencement of the suit and was therefore barred by the statute of limitations. N. J. Wood opposed the motion, arguing that the statute was tolled under 5(b) of the Clayton Act by virtue of the FTC proceeding against 3M.

On March 19, 1963, an amended complaint was filed by direction of the court. Its gravamen is the same as are the controlling legal questions.

On the motion, the trial judge held that the proceeding by the FTC to enforce Section 7 of the Clayton Act was a "civil or criminal proceeding • • • instituted by the [fol. 67] United States" within the meaning of Section 5 of the Clayton Act (15 U.S.C. 16 (1958));[2] that the statute

[2] The first paragraph of Section 5 (now 5(a) (15 U.S.C. 16(a)) provides:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on

of limitations was therefore tolled and plaintiff's filing of the complaint in this cause against 3M was timely. New Jersey Wood Finishing Company v. Minnesota Mining & Manufacturing Company, 216 F.Supp. 507 (D.C. N.J. 1963).

N. J. Wood's claim arises in the first instance under Section 4 of the Clayton Act, which provides that "persons" injured by violations "of the antitrust laws" shall be entitled to threefold damages. 15 U.S.C. 15 (1958) "Antitrust laws" as that term is employed in Section 4 has a restricted meaning. Notwithstanding other antitrust acts prior or subsequent to the Clayton Act, private parties can recover under Section 4, only where their injury has resulted from acts in violation of the specific antitrust laws, itemized in Section 1 of the Act.[3] 15 U.S.C. 12 (1958);

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behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 4A."

The second paragraph of Section 5 (now 5(b)) (15 U.S.C. 16(b)) provides:

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

[3] These "antitrust laws" are: The Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209); The Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730); and the Wilson Tariff Act (Act of

[fol. 68] Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958). The Sherman and Clayton Acts upon violations of which N. J. Wood's complaint is based, are "antitrust laws" within the meaning of Section 4. Other acts are not, including for our purposes, the Federal Trade Commission Act. See Samson Crane Co. v. Union National Sales, 87 F.Supp. 218 (D.C. Mass. 1949).

In its scheme for the enforcement of these "antitrust laws", Congress envisaged both public and private actions. United States v. Borden Co., 347 U.S. 514, 519 (1954); United States v. Cooper Corp., 312 U.S. 600, 608, 610 (1941); United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D. N.Y. 1949); see 2 Toulmin's Antitrust Laws, Section 16.6 P. 91 (1949); MacIntyre, The Role of the Private Litigant in Antitrust Enforcement, 7 Antitrust Bulletin, P. 113, et seq. (1962). Through Section 4, the business public became an ally of government and the private antitrust suit, a substantial weapon of national antitrust policy. Cinnamon v. Abner A. Wolf, Inc., 215 F.Supp. 833, 834 (E.D. Mich. 1963), citing Report of the Attorney General's National Committee to Study the Antitrust Laws, P. 378 (1955). Congress had hoped that these private antitrust suits would supplement government actions and perhaps in some cases make them unnecessary.[4]

August 27, 1894, c. 349, Section 73-77, 28 Stat. 57 as amended Act of February 12, 1913, c. 40, 37 Stat. 667).

[4] "At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money.

"The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act * * *.

"Since the enactment of the Clayton Act, the bulk of private antitrust litigation has followed successful Government action, so that the judgments and decrees in the Federal proceedings could

[fol. 69] This broad plan of private and public actions is further detailed. The Sherman Act[5] contemplates civil (Section 4) and criminal (Section 3) actions by the Justice Department, and treble damage suits by private parties (Section 7). 15 U.S.C. Sections 3, 4, 15 (1958); but cf. Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948). Under the Clayton Act,[6] private actions may

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be used to establish a case. "Amassing evidence (sic) for antitrust cases would otherwise be a prohibitively expensive task for most plaintiffs." S. Rep. No. 619, 84 Cong., 1st Sess. June 21, 1955; U. S. Code Cong. & Ad. News, 2329 (1955).

[5] The Sherman Act was the first piece of Federal Antitrust legislation. Passed in 1890, the act sought to protect commerce against unlawful restraints and monopolies, and preserve freedom of competition. Act of July 2, 1890, c. 647, 26 Stat. 209. Standard Oil v. United States, 221 U.S. 1, 50, 52 (1911). The era in which it was enacted was one "of trusts" and "combinations of business and capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." Apex Hosiery Co. v. Leader, 310 U.S. 469, 491-493 (1940). The Sherman Act was not only an immediate legislative answer to this threat, but a declaration of policy as well. It was basically a criminal statute, but Section 4 of that act also provided for enforcement by civil actions by the Justice Department through the various United States Attorneys. Section 7 also gave a private right of action for treble damages. This latter section was for practical purposes absorbed in Section 4 of the Clayton Act of 1914, but its repeal was not pronounced until 1955. Act of July 7, 1955, c. 283, § 3, 69 Stat. 283.

[6] The Sherman Act applied solely to consummated contracts and conspiracies. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922). In 1914, Congress enacted the Clayton Act which sought to reach certain specific practices, considered dangerous to free competition in commerce and trade, but not covered by the Sherman Act. Act of October 15, 1914, c. 323, 38 Stat. 730. Standard Fashion Company v. Magrane-Houston Co., 258 U.S. 346, 356 (1922); Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 738 (1945). It was thought that by making these practices illegal, the creation of trusts, conspiracies and monopolies would be arrested in their inception. See United States v. United Shoe Machinery Co., 264 Fed. 138, 162 (E.D. Mo. 1920), quoting the report of the Senate Committee.

be in the form of suits for injunctive relief (Section 16) or for treble damages (Section 4). 15 U.S.C. Sections 26, 15 (1958); public actions, in the form of suits principally by the FTC and the Justice Department under Section 11 for violations of Sections 2, 3, 7 and 8 of that act. 15 U.S.C. 21 (1958).

To be distinguished is the role of the FTC under the FTC Act.

The Federal Trade Commission was established under the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717) and invested with both [fol. 70] adjudicatory and investigatory functions. Under Section 5 (of the FTC Act) the FTC was empowered to order the discontinuance of "unfair methods of competition" and later "unfair * * * practices" which were declared "unlawful" by the Act. See the extensive legislative history in Judge Denison's partial dissent in L. B. Silver Co. v. Federal Trade Commission, 289 Fed. 985, 992-998 (6 Cir. 1923); Federal Trade Commission v. Klesner, 280 U.S. 19 (1929); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 647 (1931). Purposefully left broad and generally undefined (as to what constituted an "unfair method of competition" or an "unfair practice"), Section 5 proceeded on the idea of an administrative body of experts (the FTC) which, given a flexible standard of judgment, would discover and prevent the use of such practice before it worked a Sherman violation. See Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 394 (1953); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648 (1931); see Beer, Federal Trade Law and Practice (1942) P. 76-77. The Sherman Act was to serve as a guide for the Commission, as a "declaration of policy", to be considered in determining what constituted an unfair method of competition. Federal Trade Commission v. Beech Nut Packing Co., 257 U.S. 441 (1922); Standard Oil Co. v. Federal Trade Commission, 282 Fed. 81, 86-87 (3 Cir. 1922) affirmed 261 U.S. 463 (1923).

Within this area of "unfair methods of competition," the FTC Act and the Clayton Act overlap. At the time of the enactment of the Clayton Act, it was believed that

its specific prohibitions particularly Section 2 and Section 3 (15 U.S.C. Sections 13, 14 (1958)) would be covered by Section 5 of the FTC Act. However, Congress, by declaring these practices unlawful specifically in the Clayton Act, took away from the Commission its informed [fol. 71] judgment respecting them.[7] These "unfair methods of competition (later amended to include "unfair * * * practices"), whether prohibited specifically under the Clayton Act, or generally under the FTC Act, were to be restrained according to a congressional design. While Section 5 of the FTC Act was to be enforced by the FTC, Section 11 of the Clayton Act provided a scheme of dual enforcement of Sections 2, 3, 7 and 8 of that act, by the FTC and the Justice Department; and while the underlying substantive violation of Section 5 (FTC Act) did not give rise to a private right of action (the FTC Act was not an antitrust law within the meaning of Clayton Section 4), a violation of Sections 2, 3, 7 and 8 did, no matter by which agency, if either of them, they were enforced. In short, the FTC Act bolstered the Clayton and Sherman Acts both by restraining evils, which might also constitute violations of those acts, and by reaching areas not covered by their proscriptions. These three acts are "interlaced" remedially as well as substantively evincing a Congressional desire for a "cumulative remedy" for the threats and dangers to trade and competition. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 694-695 (1948); United States v. Borden Company, 347 U.S. 514, 518 (1954). 51 Cong. Rec. 16274-16275 (1914). The question here presented concerns in part the "cumula-

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[7] From the House version of the Clayton bill (H.R. 15657) the Senate Committee had stricken what eventually became Sections 2 and 3 of the Act because it felt that these "unfair methods of competition" would be covered by Section 5 of the FTC Act. A long debate ensued in the Senate. See 13963, 14088-14100; 14200-14229; 14249-14276 (1914). Finally the Senate voted to restore them to the Clayton bill, mainly for the reasons stated by Senator Clapp: to declare these practices unlawful specifically and withdraw them from the judgment of the commission. 51 Cong. Rec. 14257 (1914).

tive remedy" Congress provided for the violation of Section 7 of the Clayton Act. In the case at bar, both the FTC (under Section 11) and N. J. Wood (under Section 4) had brought actions based on the violation of Section 7. N. J. Wood claims that, by virtue of the FTC proceeding, it is entitled to the benefits of Section 5 of the Clayton Act. Section 5 is auxiliary to Section 4 and provides for the tolling of the statute of limitations in favor [fol. 72] of potential private suitors during the pendency of certain government antitrust suits. 3M, however, contends that the FTC proceeding is not a proceeding instituted by the United States within the meaning of Section 5.

As we indicated above, specifically granted in Section 11 of the Clayton Act, (15 U.S.C. 21 (1958)), was the jurisdiction of the FTC to enforce compliance with Sections 2, 3, 7 and 8 of the Act, (15 U.S.C. 13, 14, 18, 19 (1958)) to be shared concurrently with the Justice Department. (See footnote 12 infra.) United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953); Standard Oil Co. v. United States, 337 U.S. 293, 310 (Note 13) (1949); United States Alkali Export Association, Inc. v. United States, 325 U.S. 196 (1945). In the latter opinion, at P. 206-209 Chief Justice Stone described the enforcement of these provisions as one of "efficient cooperation" between the "two agencies". This relationship was further cemented in 1950 when Congress amended Section 11, giving the Attorney General the right to intervene in an FTC Clayton Act proceeding. Act of December 29, 1950, c. 1184, 64 Stat. 1125; House Report No. 1191, August 4, 1949, 81 Cong. 1st Session; S. Report No. 1775 June 2, 1950 81st Cong. 2d Session. See also Final Report of Attorney General's National Committee to study Antitrust Laws, G.P.O. March 1955 at P. 375, et seq. We believe that when Congress vested authority in the FTC to enforce the Clayton Act provisions, it designated the FTC as a "representative of the United States" having "authority to represent its interest in a final adjudication" of an alleged Clayton antitrust violation. Sunshine Coal Co. v. Atkins, 310 U.S. 381 (1940); United States v. Willard Tablet Co., 141 F.2d 141 (7 Cir. 1944); United States v. R. C. A., 358 U.S. 334 (1959). In the latter case, the Supreme Court held

that because the Federal Communications Commission (FCC) had not the power and authority to decide the antitrust issue there presented, the United States would not be estopped by any determination made therein. Underwritten in that decision is the thought that if the FCC [fol. 73] had the power and authority to decide those antitrust issues, FCC would have been regarded in that instance as a representative of the United States.[8] R. C. A. case, supra, P. 352. This clearly negates the proposition offered by 3M in this appeal, that suits by the United States and proceedings by the FTC must be regarded as distinct, because "agency determinations do not bar antitrust suits". The cases cited by 3M[9] deal fundamentally with questions of primary jurisdiction over matters having antitrust implications. They hold merely that agency determinations in proceedings brought in regulation of other laws (e.g., Interstate Commerce Act, Natural Gas Act) without authority to adjudicate antitrust issues will not bar antitrust suits by the United States. Cf. Pan American Airways v. United States, 371 U.S. 296 (1963). In the FTC proceeding at issue, where the Commission under Section 11 was directly given such authority to enforce the Clayton Act, such action must be regarded as one on behalf of the United States, the interests of which are now further protected by Attorney General's right of intervention.

Any argument that an FTC proceeding is not a suit by the United States must meet the reality that whether the Commission functions under the Clayton or the FTC

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[8] We do not consider that Section 11(e) of the Clayton Act or the case of United States v. W. T. Grant, 345 U.S. 629, 632 (1953) compels the conclusion that both the FTC and the Justice Department can bring separate proceedings against a single defendant for the same alleged violation under Section 11. Rather Section 11(e) would seem to indicate that a suit by the FTC under Section 11 should not work to relieve a defendant from a private antitrust suit. 15 U.S.C. 21(e) (1958). See 51 Cong. Rec. 16274 (1914).

[9] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1959); United States v. Borden Co., 308 U.S. 188 (1939); California v. Federal Power Commission, 369 U.S. 482 (1962).

Act, it does so in the public interest and as an administrative arm of the Government. See 16 C.F.R. Section 1.21 Rules of Practice of the Federal Trade Commission; Federal Trade Commission v. Cement Institute, 333 U.S. 683, 692-693 (1948); Federal Trade Commission v. Grantz, 253 U.S. 421, 432, 435 (1920), Justice Brandeis dissenting but not as to the functioning of the Commission; certainly an FTC proceeding under Section 11 of the Clayton Act [fol. 74] should not be rendered an anomaly in the Congressional plan for "antitrust law" enforcement. This plan definitely contemplates private and public actions, with some of these public actions, being brought by the FTC under Section 11. As Judge Augelli succinctly phrased it below:

> "It certainly would seem not to have been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstances of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical." New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co., 216 F. Supp. 507, 510 (D.C. N.J. 1963).

The sole reason for Section 5 of the Clayton Act was to stimulate private antitrust suits (see footnote 4) and aid such private suitors. As it appears that the FTC is the primary enforcing agency of Section 7 of the Clayton Act (see United States v. Philadelphia National Bank, 374 U.S. 321 (1963)),[10] to hold that such a proceeding was

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[10] Opinion by Mr. Justice Brennan at P. 346:

> "The legislative history shows that the objective of including the phrase 'corporation subject to the jurisdiction of the Federal Trade Commission' in Section 7 was not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section. The predominant focus of the hearings, debates, and committee reports was upon the powers of the FTC * * * Furthermore, although the Clayton Act has always provided for dual en-

not within Section 5(b) would thwart in part the Congressional scheme for the enforcement of Section 7. We think it must follow that a Section 4 private right is preserved by a Government action to enforce Section 7, whether that action is brought by the Justice Department or the FTC; that it is not a question whether it is a ju-[fol. 75] dicial or an administrative proceeding but rather whether it is a proceeding on behalf of the United States to enforce the "antitrust laws".

It is also asserted that an action by the FTC is not a "proceeding in equity", as Section 5 originally provided.[11] Certainly, when the Justice Department seeks an injunction against a defendant for violation of the Clayton Act, its purpose is to prevent irreparable injury to the public weal by the traditional equitable remedy. Section 15 of the Clayton Act, 15 U.S.C. 25 (1958); United States v. Borden Co., 347 U.S. 514, 518 (1954). The effect of the FTC proceeding is essentially the same, by virtue of the 1959 amendment to Section 11, hereinafter referred to as the Finality Act of 1959.[12] Act of July 23, 1959, Pub-L

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forcement by court and agency (cites), prior to the 1950 amendment, enforcement of Section 7 was left largely to the FTC. Martin, Mergers and the Clayton Act (1959) 205, 219; Montague, The Celler Anti-Merger Act: An Administrative Problem in an Economic Crisis, 37 A.B.A.J. 253 (1951). And the impetus to amend Section 7 came in large part from the FTC (cites). Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction." See also Mr. Justice Harlan's dissent at p. 392, supra.

[11] See footnote 2. Section 5 now reads "civil * * * proceeding" instead of "suit or proceeding in equity".

[12] Section 11 provides:

"(a) That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: * * * in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

"(b) Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person

[fol. 76] 86-107, Section 1, 73 Stat. 243. Formerly the FTC had to seek the enforcement of its order—after its determination of a Clayton Act violation, and a subsequent violation of the order (See Federal Trade Commission v.

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is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person [and the Attorney General (amended Dec. 29, 1950, c. 1184, 64 Stat. 1125] a complaint stating its charges in that respect, and containing a notice of a hearing * * *. The person so complained of shall have the right to appear * * * and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. [The Attorney General shall have the right to intervene and appear in said proceeding (amended, 64 Stat. 1125)]. * * * If up such hearing, the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * *.

"(c) (as amended by the Finalty Act of 1959, 73 Stat. 243). Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the Court of Appeals of the United States * * * by filing with the court * * * a written petition praying that the order of the commission or board be set aside. * * * Upon such filing of the petition the court * * * shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, * * * To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. * * * The judgment and decree of the court shall be final except that the same shall be subject to review by the Supreme Court upon certiorari * * *.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify or set aside orders of the commission or board shall be exclusive.

"(e) * * * No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve

Ruberoid Co., 343 U.S. 470 (1952))—by a petition to the Court of Appeals; but now enforcement decrees by the Circuit Court of Appeals are unnecessary and the orders become final and self-executing by the expiration of defendant's time to seek review.

The legislative history of the FTC Act and the Clayton Act, indicates that the FTC cease and desist order originally was to be more in the nature of "notice" of violation than an injunctive measure. The bare order had "no effect in itself, unless made operative by the Circuit Court of Appeals, * * *." Proper v. John Bene and Sons, Inc., 295 Fed. 729, 731 (E.D. N.Y. 1923). The FTC functioned as an investigatory body which would judge and note violations of the Acts. In formulating its findings and order, it presented itself in a manner analogous to a [fol. 77] Master in Equity to the Court of Appeals [See address of William H. Taft, of October 20, 1914, reported

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or absolve any person from any liability under the antitrust laws.

"(f) * * *

"(g) Any order issued under subsection (b) shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

(2) * * *

(3) * * *

(4) * * *

"(h) * * *

"(i) * * *

"(j) * * *

"(k) * * *

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation which shall accrue to the United States and may be recovered in a civil action brought by the United States. * * *"

in New York Times, October 21, 1914, P. 5] which sat not as an Appellate Court but as a court of equity enforcing, modifying or setting aside the orders of the FTC. C. E. Niehoff & Co. v. Federal Trade Commission, 241 F.2d 37, 42 (7 Cir. 1957); Federal Trade Commission v. Fairyfoot Products Co., 94 F.2d 844 (7 Cir. 1938); Butterick v. Federal Trade Commission, 4 F.2d 910 (2 Cir. 1925); L.B. Silver v. Federal Trade Commission, 292 Fed. 752, 753 (6 Cir. 1923). See e.g. 51 Cong. Rec. 14927, 14768-70, 14251-52, 16281 (1914), H. Rep. No. 1142, 63 Cong. 2d Sess. p. 19; Henderson, Federal Trade Commission (1924) pp. 77-78. In addition to examining the prospective application of the order, restraining the violation of the Act, the Court of Appeals had to determine the legality of the order, whether the facts properly found by the FTC constituted a violation of the Act. See Federal Trade Commission v. Broch and Co., 368 U.S. 360, 364 (1962); Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 473-474 (1952); Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 612 (1946); Federal Trade Commission v. Fairyfoot Products Co., 94 F.2d 844 (7 Cir. 1938); See Beer, supra p. 420. By virtue of the Finality Act, if judicial review is not sought, the cease and desist order becomes final, and an adjudication that a violation of the Clayton Act has been committed. That act brought to Clayton Act-FTC orders the same binding effect that had been given FTC orders under the FTC Act. See Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 54 (1948); United States v. Willard Tablet Co., 141 F.2d 141, 143 (7 Cir. 1944); George H. Lee Co. v. Federal Trade Commission, 113 F.2d 583 (8 Cir. 1940); United States v. Piuma, 40 F.Supp. 119 (S.D. Calif. 1941); affirmed 126 F.2d 601 (9 Cir. 1942); See 152 ALR Anno. 1198 (1944).

The "proceeding in equity" therefore was not the Commission proceeding but the proceeding before the Court [fol. 78] of Appeals from which a judgment or decree would issue determining and restraining a violation of the Act. With development of "final orders" in FTC proceedings, whether the order becomes final by expiration of time in which to seek review or by a judgment or decree from a

Court of Appeals, the proceeding resulting in such final order or decree, is a "proceeding in equity" and a "civil proceeding" within the meaning of Section 5, and an adjudication of a violation of the Clayton Act.

The vital effect of these changes is overlooked by appellant in its strong reliance upon the 1923 decision in Proper v. John Bene and Sons, Inc., 295 Fed. 729 (E.D. N.Y. 1923). That opinion held that a FTC proceeding under the FTC Act is not a "proceeding in equity . . . instituted by the United States" to restrain violations of the "antitrust laws" within Section 5 of Clayton Act. In Proper, the plaintiff brought a private antitrust suit for treble damages for violations of the Clayton, Sherman and FTC Acts. A proceeding had been brought against the defendant by the FTC under the FTC Act and the plaintiff sought to have the bare FTC order, unenforced by the courts, admitted as prima facie evidence under Section 5.

The court denied it for several reasons: that the proceeding before the Commission was not a "proceeding in equity"; that the FTC order was not a "final judgment or decree"; that the proceeding by the FTC to enforce Section 5 of the FTC Act was not a suit under the antitrust laws as that term is used in Section 5 of the Clayton Act. There are no findings in Proper contrary to our conception of the law as it stood in 1923. The Court in Proper dealt with a 1923 FTC proceeding under the FTC Act. We have before us a proceeding under the Clayton Act brought by an expanded 1960 FTC.

With that thoroughly in mind, the 1945 decision of Brunswick-Balke Collender Co. v. American Bowling and Billiard Corp., 150 F.2d 69 (2 Cir. 1945), cited by Judge [fol. 79] Augelli below, becomes far more reflective of the problem presented by this appeal. There the Court held that an FTC proceeding brought for violations of Section 3 of the Clayton Act was a "final judgment or decree" rendered in a "suit or proceeding in equity brought by or on behalf of the United States" within Section 5 of the Act. In so deciding, the Court had mistaken the scope of the Act of March 21, 1938, c. 49, 52 Stat. 111. 15 U.S.C. 45 (1958). That statute did not amend Section 11 of the Clayton Act

but only Section 5 of the FTC Act, and on rehearing the Court reversed itself, concluding that because the order was not "final", it was inadmissible as prima facie evidence under Clayton Section 5, citing Proper v. John Bene & Sons, Inc., supra. It is obvious that if the order had been final, as it is today, (by virtue of the Finality Act), the Court would have regarded the "final order" admissible under Section 5. See Fifth and Walnut v. Loew's, Inc., 176 F.2d 589, 593 (footnote 9) (2 Cir. 1949).

3M has argued that Section 5(b) (the tolling provision) is dependent upon Section 5(a) (the prima facie evidence provision), and that the two subsections must be construed as a unit. One theory advanced is that the express statement in Section 5(a): That this section shall not apply to "consent judgments or decrees" should be brought down to Section 5(b) and interpreted so as to prevent the tolling of the statute of limitations where the civil or criminal proceeding is terminated by a consent order. Apart from the legislative history which negates such construction 51 Cong. Rec. 15825-15826; 16046-47; 16276 (1914), it would seem that if the proviso were to apply to both paragraphs, there would be no reason to insert it after the first. As the district court further pointed out: "The proviso is grammatically a part of the single sentence which comprises Section 5(a), separated only by a colon." See Flora v. United States, 362 U.S. 145, 150 (1960). More important is the substantive application of the consent judgment proviso. While the proviso deals [fol. 80] with the termination of the government suit, the tolling provision operates during its "pendency". Section 5(a) permits the use of government judgments and decrees as prima facie evidence, only as to matters actually decided in the government suit. Emich Motors Corp. v. General Motors, 340 U.S. 558 (1951). 5(b) tolls the statute of limitations as to "matters complained of" whether or not they are actually decided. Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561 (10 Cir. 1962). To construe this section as appellant desires, would be to force every private antitrust claimant caught between the running of the statute and the possible consent termination of the government proceeding, to start suit without the benefits

of the government action. See Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366, 372-376 (D.C. Minn. 1939), affirmed on other grounds, 119 F.2d 747 (8 Cir. 1941); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846 (8 Cir. 1952).

The defendant 3M also suggests that proceedings which cannot yield judgments and decrees applicable as prima facie evidence under Section 5(a) cannot toll the statute of limitations under Section 5(b). The legislative history is sparse on the interrelationship between the two sections. The only clear Congressional commentary on this point occurred in the debates on the House Clayton bill, (51 Cong. Rec. 9165, 9488-90 (1914)), which had no provision for the enforcement of its sections by the FTC; [See H. Rep. No. 627, 63 Cong. 2d Sess. (1914)]; so that the question whether FTC proceedings to enforce the Clayton provisions tolled the statute of limitations was not squarely met by the 1914 legislators. The House debates support 3M's view solely to the exent that the tolling provision was to enable the private claimant to reap the benefits of the government action, i.e., the use of a government judgment and decree as prima facie evidence. Union Carbide & Carbon Corp. v. Nisely, 300 F.2d 561 (10 Cir. 1962). But see 51 Cong. Rec. 16003 (1914). In addition to the [fol. 81] decisions noted infra (see footnote 14, infra), other courts have regarded the two subsections as related and dependent. See Sun Theatre v. R.K.O. Radio Pictures, 213 F.2d 284, 289-293 (7 Cir. 1951); Momand v. Universal Film Exchange, 43 F.Supp. 996, 1012 (D.C. Mass. 1942), affirmed 172 F.2d 37 (1 Cir. 1948). However, we see no reason why final FTC orders enforcing the Clayton Act should not be admitted as prima facie evidence under Section 5(a). Brunswick-Balke Collender Co. v. American Bowling and Billiard Corp., 150 F.2d 69 (2 Cir. 1945). But cf. United States v. United Shoe Machinery Corp., 89 F.Supp. 349, 356 (D.C. Mass. 1950). (Final disposition of case 110 F.Supp. 294 (D.C. Mass. 1953), affirmed per curiam 346 U.S. 894 (1953)). While our 1914 legislators would not have accepted a bare FTC order of that period as admissible, the finality given such order through a decree emanating from the Court of Appeals would have re-

sulted in its being considered a "final judgment or decree" within Section 5(a). Today of course, under the Finality Act, the orders of the FTC become final adjudications of antitrust violations by expiration of the time in which review can be sought.

The operation of Section 5(a) has been explained to some extent by Emich Motors Corp. v. General Motors, 340 U.S. 558 (1951). Judgments and decrees in government suits are only prima facie evidence of antitrust violations. The defendant still has his "day in Court" on that issue. See Harrison v. Paramount Pictures, 115 F.Supp. 312 (E.D. Pa. 1953), affirmed 211 F.2d 405 (3 Cir. 1954). He is entitled to offer rebuttal evidence to break down the force and effect of that prima facie evidence. 51 Cong. Rec. 13856-13858 (1914); see the authorities collected in Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 716-727 (9 Cir. 1959). See also 65 Harv. L.Rev. 1400 (1952). 3M argues that FTC orders cannot be admitted because of the more liberal evidentiary rules of the administrative agency. This plus the broader administrative process [fol. 82] might place the FTC proceeding on a somewhat unequal footing with a similar judicial proceeding brought by the Department of Justice. See United States v. Morton Salt Co., 338 U.S. 632, 641-643 (1950); Hunt Foods & Industries, Inc. v. Federal Trade Commission, 286 F.2d 803 (9 Cir. 1961). But see United States v. Household Goods Movers Investigation, 184 F.Supp. 689 (D.C. D.C. 1960). The differences are at most peripheral and any attack along those lines would go to the weight of the prima facie evidence, not to its propriety. The use of administrative orders as prima facie evidence in private suits is not new to our law. Under the Interstate Commerce Act, 49 U.S.C. Section 16 (13) (1958) a reparation order of the ICC is admissible as prima facie evidence in an action for damages by a shipper against a defendant railroad, found by the ICC to have exacted unreasonable rates.[13] Meeker & Co. v. Lehigh Valley R.R., 236 U.S. 412, 430 (1915);

[13] When the FTC bill reported out of the Senate Committee June 13, 1914 [S.Rep. No. 597, 63 Cong. 2d Sess. (1914)], it reflected a desire for a Commission with the same "effective powers

Pennsylvania R. Co. v. Weber, 257 U.S. 85 (1921); Western Maryland Ry. v. Penn Veneer Co., 92 F.2d 146 (3 Cir. 1937). While we are satisfied that final orders in FTC Clayton Act proceedings are admissible under Section [fol. 83] 5(a) as prima facie evidence, in the case at bar, N. J. Wood will not get the benefit of Section 5(a) because the FTC proceeding involved ended in a consent order, apparently before any testimony was taken. We have reached this question solely because there was some evidence in the legislative history of the section that the two subsections are to be construed together, as other courts have subsequently held. However, the decision of the court below that the two subsections should not be regarded as inter dependent does have substantial support.

The above mentioned intention in 1914 does not seem as plain in 1955 when Congress amended Section 5 and

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and usefulness as had been given the ICC." 51 Cong. Rec. 10376 (1914). The floor debates in the Senate reveal a recurring Congressional feeling for an FTC functioning like the ICC. Distinctions and similarities were consistently noted. Representative Covington said:

> "There is, however, a perfect analogy between the former power of the Interstate Commerce Commission under the Cullom Act and the power of the Federal Trade Commission. Under the Cullom Act, the Interstate Commerce Commission had the power to determine whether an existing rate was unreasonable, and, if it is so found, to order the railroad to cease and desist from charging that rate.
>
> "The Federal Trade Commission will have precisely similar power in regard to an existing method of competition. It is instructive therefore to bear in mind that the orders of the Commission under that act were not final but were subject to review by the courts." 51 Cong. Rec. 14932 (1914).

Also, in the Senate report in the Clayton Bill (S. Rep. No. 698, 63 Cong. 2d Sess. 1914), the Committee recommended the change in Section 5(a) from "conclusive evidence" to "prima facie evidence". At P. 45, it drew the analogy of the use of a tax deed as evidence of title, citing Cooley in Taxation, 521 5th Ed. 1886, and Marx v. Hanthorn, 148 U.S. 172, 183 (1893). These same thoughts are expressed in the ICC-Meeker case, supra, which cites Marx v. Hanthorn. Such Congressional thinking tends to show that the 1914 legislator would not be adverse to the use of affirmed FTC orders as prima facie evidence.

divided Section 5 into subsections (a) and (b). Act of July 7, 1955, c. 283, Section 2, 69 Stat. 283. The committee reports on the 1955 amendment to Section 5, plainly intimated a broader reason for tolling the statute of limitations. By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor. See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 102-103 (1954). The real importance of government proceedings that accrues today to private suitors is the availability to them of the government's case against the defendant. Section 5(b) enables "a plaintiff to take advantage of facts uncovered" as a result of the government proceedings. New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co., 216 F.Supp. 507 at P. 510 (D.C. N.J. 1963). In the Senate Report on the 1955 amendment to Section 5 (b) the Committee wrote:

> "Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate [fol. 84] his own damages, assess the strength and validity of his suit, and prepare and file his complaint". Senate Report No. 619, June 21, 1955, U. S. Code Cong. & Ad. News, 84 Cong. 1st Sess. P. 2332.

Whether or not this shift in congressional intent was there fully outlined, it seems to us that FTC orders and FTC proceedings presently enjoy the efficacy of court proceedings for purposes of Section 5, and that in this appeal the FTC proceeding against 3M to restrain a violation of Clayton Section 7, tolled the statute of limitations and that N. J. Wood's complaint was timely.

Three recent decisions[14] on the issue before us all relied on the old Proper case, supra, and summarily re-

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[14] Highland Supply Corporation v. Reynolds Metals Company, 221 F.Supp. 15 (E.D. Mo. 1963), reversed in part (but affirmed

jected the Brunswick Balke-Collender opinion. In so doing, those courts clearly overlooked the affirmative statutory distinction between FTC proceedings under the FTC Act and under the Clayton Act and that distinction's vital effect upon Section 4 and Section 5 of the Clayton Act; otherwise they could not have reasonably adopted the obsolete Proper rule. To do so at this stage is to consider the present question in a vacuum and simply forget all about the present governing statutory formula for the enforcement of the Clayton Act and the increased powers that have come to the FTC.

It is also clear that the status of the Brunswick-Balke opinion of Judge Frank was fundamentally misunderstood. The sound legal principle there pronounced that final FTC orders in Clayton Act proceedings are admissible within Section 5(a), was not reversed. It was simply not usable because, as was discovered, there was no Finalty Act at the time, dealing with FTC-Clayton Act orders. When Congress passed the Finalty Act in 1959, it simply [fol. 85] vitalized the principle of Brunswick-Balke as to Section 5(a). We are satisfied that this principle is good law and good common sense and that its logical extension is applicable to the Section 5(b) question here involved.

Finally, 3M claims that even if the FTC proceeding tolled the statute of limitations, it preserved only the Clayton counts and the Sherman counts are barred. The statutory language of Section 5(b) tolls the statute as to "any matter complained of" in the Government suit. One of the overt acts upon which N. J. Wood's conspiracy count was based was the acquisition of IWI by 3M.[15] While "con-

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on the issue at bar) 327 F.2d 725 (8 Cir. 1964); Volasco Products Co. v. Lloyd A. Fry Roofing Company, 223 F.Supp. 712 (E.D. Tenn. 1963); Farmington Dowel Products Co. v. Forster Mfg. Co., Inc., 223 F.Supp. 967 (D.C. Me. 1963).

[15] Defendant Essex Wire is not before us on appeal, but it appears from the record that the trial judge below dismissed it with prejudice only as to the Clayton counts and not as to the Sherman counts. Though we do not decide the question, it would appear that the statute of limitations is tolled only as to named defendants in the Government suit. Sun Theatre Corp. v. R.K.O. Radio Pictures, 213 F.2d 284 (7 Cir. 1954); Momand v. Universal Film Exchanges, 172 F.2d 37 (1 Cir. 1948).

tract of conspiracy" was not at issue before the FTC, the acquisition of IWI was. N. J. Wood's complaint alleges that this act of acquisition was in furtherance of a conspiracy to restrain competition and to monopolize trade. There was a "substantial identity of subject matter." Union Carbide and Carbon Corporation v. Nisley, 300 F.2d 561, 570 (10 Cir. 1962). We, therefore hold that the acquisition of IWI was a "matter complained of" within Section 5(b) and that the statute of limitations was tolled as to the Sherman as well as the Clayton counts. Union Carbide, supra; Steiner v. 20th Century-Fox Film Corporation, 232 F.2d 190, 196 (9 Cir. 1956).

The judgment of the District Court will be affirmed.

[fol. 86]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,487

NEW JERSEY WOOD FINISHING COMPANY,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY and ESSEX WIRE CORPORATION,

MINNESOTA MINING AND MANUFACTURING COMPANY, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: Biggs, Chief Judge, and McLaughlin and Hastie, Circuit Judges.

JUDGMENT—May 20, 1964

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order filed April 19, 1963, entered April 22, 1963, of the said District Court be, and the same is hereby affirmed, with costs.

May 20, 1964

[File endorsement omitted]

[fol. 87]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14487

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—June 5, 1964

Pursuant to Rule 36 (2) of this Court, it is Ordered that issuance of the mandate in the above cause be, and it is hereby stayed until July 6, 1964.

McLaughlin, Circuit Judge.

[fol. 88] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 89]

SUPREME COURT OF THE UNITED STATES

No. 291—October Term, 1964

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

vs.

NEW JERSEY WOOD FINISHING COMPANY.

ORDER ALLOWING CERTIORARI—October 19, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

The Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 291

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff-Respondent,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Petitioner,

and ESSEX WIRE CORP.,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SIDNEY P. HOWELL, JR.,
230 Park Avenue,
New York 17, New York.

CHARLES C. TRELEASE,
744 Broad Street,
Newark 2, New Jersey,
Attorneys for Petitioner.

EDWIN E. MCAMIS,
WINTHROP D. THIES,
REGAN GOLDFARB POWELL & QUINN,
New York, New York.

THOMAS J. LYONS,
St. Paul, Minnesota,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff-Respondent,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Petitioner,

and ESSEX WIRE CORP.,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in *New Jersey Wood Finishing Company* v. *Minnesota Mining & Manufacturing Company and Essex Wire Corp.*, No. 14,487, entered May 20, 1964.

Opinions Below

On April 19, 1963, the United States District Court for the District of New Jersey (Augelli, D. J.) denied the motion of defendant Minnesota Mining & Manufacturing Company (hereinafter "3M") to dismiss the complaint in this private antitrust action as barred by the statute of limitations provided in Section 4B of the Clayton Act as

amended, 15 U. S. C. § 15b. Judge Augelli's opinion (reported at 216 F. Supp. 507) and the order entered thereon were printed in the Appendix to Defendant-Appellant's Brief in the Court of Appeals (cited as "CA App"; 58a-67a). On May 20, 1964, the United States Court of Appeals for the Third Circuit affirmed the District Court in an opinion ~~not yet generally reported (but see CCH Trade Reg. Rep't'r, Current Cases at ¶71,110)~~ which appears in the Appendix hereto, pp. A2-A26 AND IS REPORTED AT 332 F2d 346.

Jurisdiction

The Court of Appeals obtained jurisdiction by virtue of 28 U. S. C. § 1292(b) following appropriate certification by the District Court (CA App., 67a) and its own grant of a petition for review.

The judgment of the Court of Appeals was entered May 20, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Is a Federal Trade Commission proceeding a "civil or criminal proceeding . . . instituted by the United States" within the meaning of Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b)?

2. Is an FTC order to cease and desist the full legal equivalent of "a final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States" within the meaning of Section 5(a) of the Clayton Act, 15 U. S. C. § 16(a)?

3. Does an FTC complaint which alleges that a series of vertical and horizontal acquisitions in the years 1952 to 1956 may substantially lessen competition in violation of Section 7 of the Clayton Act, but alleges no violation of the Sherman Act, sufficiently "complain of" Sherman

Act matters to suspend the statute of limitations otherwise applicable to a private treble damage claim that the final acquisition in August of 1956 was alone the product of a conspiracy and an attempt to monopolize forbidden by Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2?

Both courts below specifically answered each of these questions—there squarely raised—in the affirmative. Each question now rises in this Court as one of the first impression although each has been answered in the negative in other circuit and district courts.

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the due process clause of the Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

The statutory provisions involved are Sections 4B and 5 of the Clayton Act. Section 4B, 69 Stat. 283, 15 U. S. C. § 15b reads, in relevant part, as follows:

> "Any action to enforce any cause of action under sections 4 or 4A of this title shall be forever barred unless commenced within four years after the cause of action accrued."

Section 5 of the Clayton Act, 69 Stat. 283, 15 U. S. C. § 16, in its present form (and as amended in 1955 to take account of the enactment of Section 4B), reads as follows:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Sec-

tion 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 4A.

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws but not including an action under Section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under Section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Section 5, from its original enactment (38 Stat. 731) and until 1955, read as follows:

"A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: . . .

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private

> right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Thus, on the face of the statute, it is clear that the amendments to Section 5 in 1955—the first and, to date, only occasion on which Congress has actually amended this section—accomplished the following:

1. Provided—as the amendment's only substantive change—that tolling the period of limitations with respect to private claims would extend not only during pendency of proceedings by the United States but also for one year following termination of such proceedings;

2. Placed the *prima facie* evidence and tolling provisions into separately lettered subparagraphs; and

3. Replaced the phrases "criminal prosecution" and "suit or proceeding in equity" as they appeared in both paragraphs of Section 5 with the phrase "any civil or criminal proceeding."

Finally—and only because of the decision of the Court of Appeals below and without conceding the provision to be in any way applicable—we quote Section 11(g) of the Clayton Act after its enactment in 1959, 73 Stat. 243, 15 U. S. C. § 21(g);

> "(g) Any order issued under subsection (b) of this section shall become final—
>
> (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time. . . ."

Statement of the Case

On November 20, 1961, New Jersey Wood Finishing Company, a manufacturer of electrical insulation materials and plaintiff below (hereinafter "New Jersey Wood"), filed its original complaint seeking treble damages and other

relief for alleged violations of both Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Section 7 of the amended Clayton Act, 15 U. S. C. § 18. New Jersey Wood claims that 3M's acquisition from defendant Essex Wire Corp. of the principal assets of Insulation and Wires, Inc. (hereinafter "IWI") in August, 1956, deprived New Jersey Wood of an important outlet for its products in favor of 3M's competitive products thereby restraining trade in violation of the particular antitrust statutes cited.

While New Jersey Wood amended its complaint (CA App 48a-55a)* to allege certain other acts and effects claimed to have damaged its business, it is conceded that 3M's acquisition of IWI is central to plaintiff's case. That acquisition, therefore, fixed "the time the blow which caused the damage was struck". *Cf. Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190, 194-5 (9th Cir., 1956).

Inasmuch as the action was commenced more than four years after 3M's acquisition of IWI's assets, answering the complaint was deferred by stipulation and 3M moved pursuant to Rule 12(b)(6) and, alternatively, Rule 56(b) of the Federal Rules of Civil Procedure, to dismiss the complaint and/or for summary judgment thereon (plus certain other relief not presently pertinent) on the ground that the action was barred (CA App. 10a-13a).

On April 19, 1963, Judge Augelli rendered his opinion and entered the order of which review is sought denying 3M's motion on the grounds that the applicable statute of limitations had been tolled by virtue of Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b), with respect to all alleged violations of both the Clayton and the Sherman Acts because

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* During the pendency of the motion in the District Court, New Jersey Wood filed an amended complaint pursuant to direction by the Court (CA App 56a-57a). While both the original complaint (CA App 5a-9a) and the amended complaint were included in the record the controlling legal questions are common to both pleadings. Judge Augelli treated with the amended complaint throughout, as did the Court of Appeals.

of the pendency of an FTC proceeding against 3M which terminated in a consent order in August, 1961.

The proceeding in question (FTC Docket No. 7973) proceeded upon a complaint issued June 24, 1960 (CA App. 15a-26a) which charged, *inter alia*, that 3M's acquisition of IWI from Essex Wire in August, 1956, among other acquisitions, had violated Section 7 of the Clayton Act. Inasmuch as the FTC has no jurisdiction over Sherman Act violations as such (*FTC* v. *Cement Institute*, 333 U. S. 683, 690-2 [1948]; *U. S. Alkali Export Ass'n* v. *U. S.*, 325 U. S. 196, 208 [1945]), its complaint—unlike that at bar—made no reference to, or any charge respecting, the Sherman Act. The consent order of August 24, 1961 terminating that proceeding (CA App. 47a) and entered before any testimony had been taken—see 15 U. S. C. §16(a)—likewise made no reference to conduct which could be deemed violative of the Sherman Act.

Judge Augelli's order (CA App. 67a) recited that, under 28 U. S. C. 1292(b), a controlling question of law was involved, as to which there was substantial ground for a difference of opinion, and that an immediate appeal might materially advance the ultimate termination of the litigation. The Court of Appeals for the Third Circuit granted 3M's petition for an interlocutory appeal and, on May 20, 1964, affirmed the District Court in all respects.

REASONS TO GRANT THE WRIT

A. Conflict in the Circuits

The ruling of the District Court, which now carries the authority of one Court of Appeals, not only involved controlling questions of law going to the heart of this particular action, but also a number of novel concepts and determinations never before arising in the half-century of private enforcement of rights created by the Clayton Act. Until Judge Augelli's decision, no court had ever held that

pendency of an FTC proceeding, much less one terminating in a consent order, could serve to toll the applicable statute of limitations, (since 1955, Section 4B).

Since Judge Augelli's opinion was filed, private plaintiffs in suits pending in three other districts have sought to secure for themselves the benefits of tolling during the pendency of FTC proceedings. Without exception, the other courts to which such contentions have been urged have expressly rejected Judge Augelli's rationale, held that FTC proceedings are not within the scope of Section 5 of the Clayton Act and denied the relief sought.

Chief Judge Taylor of the Eastern District of Tennessee first considered Judge Augelli's determination and, in *Volasco Products Co. v. Fry Roofing Co.*, 223 F. Supp. 712 (E. D. Tenn., 1963), rejected that ruling as "doubtful authority" (p. 713). Next, Judge Meredith in *Highland Supply Corp.* v. *Reynolds Metals Co.*, 221 F. Supp. 15, 17 (E. D. Mo., 1963) noted that, although the FTC shares jurisdiction with the Justice Department to enforce certain sections of the Act, this could not alter the fact that Congress "by its language" had provided for a tolling of limitations only for judicial proceedings. Finally, in *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 223 F. Supp. 967 (D. C. Me., 1963), Judge Gignoux concluded after a thorough review of the legislative history and previous judicial interpretations of Section 5 that FTC proceedings had never been and were not within its purview.*

During pendency of the appeal in the case at bar, the Eighth Circuit accepted an interlocutory appeal in the *Highland Supply* case and, while reversing the District Court's rulings on other grounds, expressly affirmed Judge Meredith's holding that an FTC proceeding could not toll the statute of limitations in a unanimous opinion by Circuit

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* The First Circuit denied plaintiff's application under § 1292 (b), 28 U. S. C., to appeal Judge Gignoux's decision in an order dated December 10, 1963 (Case #6244).

Judge Ridge. To the Eighth Circuit, the language of Section 5 so clearly excluded FTC proceedings that resort to legislative history for guidance was unnecessary. *Highland Supply Co.* v. *Reynolds Metals Company*, 327 F. 2d 725, 730 (8th Cir., 1964). Here, again, Judge Augelli's views were characterized as "of doubtful authority".

By affirming Judge Augelli, however, the Third Circuit has now created a flat conflict in the decisions in this important area (which its opinion frankly acknowledges) and has declared that pendency of an FTC proceeding does toll the statute of limitations. In fact, the Third Circuit has gone further and has declared for the first time that FTC orders may constitute *prima facie* evidence against a defendant in a subsequent private suit, thereby—for Section 5 purposes—making FTC cease and desist orders equivalent to the "judgments and decrees" of courts.

Furthermore, in ruling that, when the FTC proceeds to enforce the Clayton Act, "such action must be regarded as one on behalf of the United States", the Circuit Court's decision below conflicts directly with prior cases which, in one context or another, have held the FTC and the United States to be separate legal entities. *FTC* v. *Nash-Finch Co.*, 288 F. 2d 407, 410 (D. C. Cir., 1961); *U. S.* v. *Aluminum Company of America*, 1 F. R. D. 48 (S. D. N. Y., 1938); *Proper* v. *John Bene & Sons*, 295 Fed. 729, 732 (E. D. N. Y., 1923). Although similar issues do arise in Clayton Act cases, additional doubt as to the Third Circuit's view stems from the very real difference in the functions performed by these two enforcement arms. *Marquette Cement Mfg. Co.* v. *FTC*, 147 F. 2d 589, 593-4 (7th Cir., 1945) final disposition reversed on other grounds, *sub nom. FTC* v. *Cement Institute, supra.*

Certainly the rationale adopted below is at variance with the many citable instances in which this Court has reviewed separate—and, on occasion, opposing—positions of the United States, on the one hand, and one of our regulatory agencies on the other. See, *e.g.*, *Henderson* v.

U. S., 339 U. S. 816 (1950); *U. S.* v. *Interstate Commerce Commission*, 337 U. S. 426 (1949); *cf. Standard Oil Co.* v. *FTC*, 340 U. S. 231 (1951).

It is also relatively clear that this duality in legal personality is at least sufficient to deny the actions of the FTC the effect of an estoppel vis-a-vis the United States. See, *e.g.*, *U. S.* v. *Charles Pfizer & Co.*, 205 F. Supp. 94, 97 (S. D. N. Y., 1962); *U. S.* v. *General Electric Co.*, 15 F. 2d 715 (N. D. Ohio, 1925), aff'd. 272 U. S. 476 (1926); *cf.* Clayton Act, Sec. 11(c), 15 U. S. C. § 21(c).

Thus the Third Circuit, in flatly holding that an administrative hearing initiated by the Trade Commission is the full legal equivalent of a "civil or criminal proceeding . . . instituted by the United States," has traversed any number of prior rulings in this Court and elsewhere which have heretofore denied that the FTC and the United States are one and the same entity. Clearly whether these distinctions are to be maintained or discouraged is of fundamental importance to a reasoned understanding of Section 5 of the Clayton Act.

B. Novelty and Importance of the Decisions Below

Is the Clayton Act's four-year statute of limitations on private treble damage suits tolled during pendency of an FTC proceeding? In other words, is an FTC proceeding a "civil or criminal proceeding" instituted "by the United States"? This, however, is only part of a broader question as to whether proceedings under the Clayton Act before administrative agencies* were intended by Congress to have the extraordinary effects which Section 5 of the Act, as originally adopted in 1914, accorded to "suits" and "proceedings in equity" by "the United States."

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* Section 11(a), 15 U. S. C. § 21(a), grants jurisdiction to enforce certain of the Act's provisions to several administrative agencies, including—in addition to the FTC—the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Reserve Board.

The Third Circuit has now answered these questions affirmatively and has also held—again for the first time—that an order emanating from the Commission in a Clayton Act proceeding can constitute *prima facie* evidence in a subsequent treble damage action. The Eighth Circuit and three other District Courts have held to the contrary in equally emphatic terms. The resulting uncertainty calls for resolution of this Court, and the answers are to be found in judicial and Congressional interpretations of Section 5 and considerations of policy that should govern administrative enforcement of the Act.

The Statute:

Fifty years of enforcement of the Clayton Act had yielded no authority—until the decisions below—holding either that (a) the findings of administrative bodies in proceedings under the Clayton Act could qualify under Section 5(a) as *prima facie* evidence in subsequent private actions or that (b) proceedings by such bodies could toll the statute of limitations as provided by Section 5(b). Significantly, not only had there been no decided case precisely on the tolling point, it does not appear that any previous private plaintiff had so much as even contended that administrative proceedings were within the scope of the tolling provision. *Cf. FTC* v. *Bunte Bros.*, 312 U. S. 349, 352 (1941).

The *prima facie* evidence provision, on the other hand, had received considerable attention. However, both Congressional expositions and judicial decisions construing Section 5 establish that Congress, in 1914, did not make administrative determinations in Clayton Act proceedings admissible as *prima facie* evidence. Such a conclusion was virtually compelled by the language of Section 5 which, from 1914 until its amendment in 1955, described the document to which it accorded the status of *prima facie* evidence as "a final judgment or decree" rendered in a "criminal prosecution" or a "suit or proceeding in equity" brought by or on behalf of "the United States". As early

as 1923, the Court in *Proper* v. *John Bene & Sons,* 295 Fed. 729 (E. D. N. Y., 1923), held this language was judicial in context and applied to judgments which resulted from actions in court by the Attorney General but not to orders issued by the FTC.

In 1955, well after the Federal Rules of Civil Procedure had abolished the concept of a proceeding in equity, Section 5 was amended and the phrase "civil or criminal proceeding" was substituted for the phrase "criminal prosecution" or "suit or proceeding in equity". No court, however, including the Third Circuit has considered that this language change was intended to bring administrative proceedings within the purview the section as substantive law. The other requirements specified in 1914 were left unchanged in 1955 and 1955 is the only time that Section 5 of the Clayton Act has been amended since its original enactment. Although the changes made then had been under consideration in Congress for several years, there had been not the slightest suggestion that Congress intended the eventual amendment to alter this interpretation despite numerous express references to the fact that Section 5 had been widely assumed to exclude FTC orders. See, *e.g., U. S.* v. *United Shoe Machinery Corp.,* 89 F. Supp. 349, 356 (D. C. Mass, 1950; Wyzanski, J.); *International Tag & Salesbook Co.* v. *American Salesbook Co.,* 6 F. R. D. 45, 48 (S. D. N. Y., 1943); *Proper* v. *John Bene & Sons, supra;* 2 Toulmin's *Anti-Trust Laws* p. 118 (1949); Kronstein & Miller, *Regulation of Trade, a Case and Textbook,* p. 1106 (1953); 2 CCH Trade Reg. Rep'r., § 9157; see also dissent by Judge Evans from original decision in *Brunswick-Balke-Collender Co.* v. *American Bowling & Billiard Corp.,* 150 F. 2d 69, 73 (2d Cir., 1945), rev'd. on rehearing 150 F. 2d 74.

The Decisions Below:

The Third Circuit actually has now confirmed 3M's position that neither the *prima facie* evidence nor the tolling provision of Section 5 applied to administrative proceed-

ings when Section 5 was originally enacted or when it was amended in 1955. Such a determination acknowledges that during most of the years the Clayton Act has been enforced the rights of private plaintiffs did differ depending on whether the Justice Department or the FTC undertook enforcement. Thus the Court of Appeals deliberately cast away the principal reason offered to support the District Court decision, namely, that it did not "seem logical" that Congress would intend to have a plaintiff's rights turn on whether a prior enforcement proceeding had been undertaken by court or agency.

Nevertheless, the Third Circuit held that FTC orders and FTC proceedings presently enjoy all the efficacy of court proceedings for purposes of Section 5 and frankly rested the entire weight of this decision on the 1959 amendment to Section 11 which made FTC orders final and enforceable upon expiration of the time to appeal. As in 1955, the reports that preceded the Finality Act of 1959, 73 Stat. 243, give no hint of any Congressional purpose to bring administrative proceedings and administrative orders within the scope of Section 5.* Thus, in 1959 Congress amended Section 11 of the Act, 15 U. S. C. § 21, and gave no indication whatsoever that it had intended to consider—much less enlarge—Section 5. However, the Third Circuit would work this momentous, substantive change in the scope of Section 5 on the mere implication that, in making administrative Clayton Act orders final, Congress somehow intended, *sub silentio,* to make Section 5 applicable to them.

Still another point involving the determination of the extent of tolling, if any, requires this Court's construction of Section 5(b)'s provision that any suspension of limitations extends only to claims "based in whole or in part on any matter complained of" in the government proceeding.

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* Sen. Rep. 83, 86th Cong. 1st Sess., U. S. Code Cong. & Admin. News, 1959, Vol. 2, 1804 *et seq.*

The courts below, we submit, virtually read this limitation out of Section 5 altogether. While the problem thus presented is obviously one of transcendent importance, its resolution for this particular case is fundamental to the future course of the litigation. Plaintiff rests solely upon only one aspect of the charge made by the FTC in Docket 7973—that 3M's ultimate acquisition of IWI, following seven prior acquisitions in the electrical insulation field, might tend to lessen competition in violation of Section 7. By now alleging that that single acquisition, in fact, resulted from an actual conspiracy to restrain trade between 3M and its co-defendant Essex Wire Corp. and actually tended to create a monopoly in violation of Sections 1 and 2 of the Sherman Act to this plaintiff's particular damage as a competing manufacturer of electrical insulation, the complaint here charges misconduct different from, and in addition to, the earlier charge made by the FTC. It may well be that these additional charges will be the ones plaintiff must prove in order to recover because there is nowhere a citable instance of a treble damage recovery predicated upon Section 7 of the Clayton Act as against District Court authority that Section 7 affords no such recovery. See *Gottesman* v. *General Motors Corp.*, 221 F. Supp. 488, 493 (S. D. N. Y., 1963), pet. for cert. pending, Dkt 1152 (filed May 27, 1964). Thus, if this view of the law is upheld by this Court, plaintiff will eventually forego Section 7 altogether and stand solely on its Sherman Act allegations. This being so, it is appropriate to ask now—and directly—whether conduct prohibited by the Sherman Act was a "matter complained of" by the FTC in Docket 7973.

The Third Circuit found it unnecessary to cite any authority to support the ruling announced in the last brief paragraph of its opinion that plaintiff's conspiracy and attempted monopolization allegations are timely, even though not charged by the FTC, since they arise from the same acquisition that was the subject of the FTC complaint. Unlike either of the other determinations which the lower

courts were required to make, however, there was on this point considerable previous authority, all contrary to the rule the District Court and the Third Circuit have announced. In addition to *Gottesman, supra,* (which involved the same contention made here as to the same statutory sections), Judge Wyzanski, for instance, had already held that a suit by the United States charging a Section 7 violation did not toll the statute of limitations for a private plaintiff relying on Sherman Act allegations. *Momand* v. *Universal Film Exchange,* 43 F. Supp. 996, 1012 (D. Mass., 1942), final determination affirmed 172 F. 2d 37 (1st Cir., 1948).

In any event it is manifest that "not every violation of § 7 . . . would necessarily be a violation of the Sherman Act." *U. S.* v. *Philadelphia National Bank,* 374 U. S. 321, 355 (1963); *Times-Picayune Publishing Co.* v. *U. S.,* 345 U. S. 594, 609-610 (1953). See *U. S.* v. *Aluminum Co. of America,*—U.S.—, 12 L. Ed. 2d 314, 319 (1964) citing *Brown Shoe Co.* v. *U. S.,* 370 U. S. 294, 323 (1962); *Int'l Shoe Machine Corp.* v. *United Shoe Machinery Corp.,* 315 F. 2d 449 (1st Cir., 1963) cert. den. 375 U. S. 820 (1963); *United Banana Co.* v. *United Fruit Co.,* 172 F. Supp. 580 (D. Conn., 1959).

It could hardly be more clear that (a) a multilateral conspiracy (b) resulting in an ascertainable present restraint of trade or a monopoly (c) to the personal damage (d) of a competitor (e) in the period after 1956 presents different legal issues turning upon different factual considerations than in the case of a series of acquisitions in the period 1952 to 1956 where the effect may be "substantially to lessen competition, or to tend to create a monopoly". As this Court has pointed out, the whole thrust of Congressional concern in amending Section 7 in 1950 was the impact of mergers on *competition,* rather than on *competitors. Brown Shoe Co.* v. *U. S., supra,* at pp. 320, 344.

Thus, quite irrespective of the novel and unique extension of Section 5 by the lower courts to embrace regulatory

agency proceedings, it appears that a patent limitation on the scope of Section 5(b) has been obscured—if, indeed, not eliminated—in defiance of considered authority to the contrary.

It is to review these novel and important concepts in the context in which first expounded that we request certiorari.

C. Constitutional Implications

Not only do the opinions below lack any affirmative support in statutory history or previous interpretation but, in addition, the Third Circuit opinion fails to deal adequately with distinctions—having Constitutional import—that have come to be recognized between judicial and administrative proceedings. Such distinctions and the policies which support them provide another impelling reason for this Court to consider this appeal.

For many years, our law has recognized that administrative agencies perform functions which are only partly judicial in nature and that procedures considered necessary to a judicial determination could and should be relaxed for administrative determinations insofar as allowed by enabling statutes and Constitutional concepts of due process. The justification for administrative procedures which, among other non-judicial elements, admit hearsay evidence was offered by this Court in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705-6 (1948):

> "Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. . . . And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress."

The Third Circuit's opinion is obviously inconsistent with this rationale. Using a Commission order as *prima facie* evidence or, for that matter, tolling the statute of limitations during a Commission proceeding surely punishes defendants for past conduct found unlawful only by the Commission operating under administrative procedures and standards of evidence and heavily occupied with considerations of national economic policy rather than adjudicating issues between parties litigant. Certainly, the answer given to this contention is unsatisfactory. The Court declared that a defendant against whom an administrative order was introduced as *prima facie* evidence could attack the *weight* of that evidence although not its *propriety*.

This answer, however, not only fails to take account both of the practical possibilities open to a defendant faced with such an order and also the possible applicability of the legal rules barring collateral attack on the basis of a judgment but clearly pose fundamental questions of procedural due process. Can the determinations of regulatory agencies—and we do not perceive that the scope of the ruling below is limited to FTC determinations—be converted wholesale into "evidence" in consonance with the Constitution when those determinations are readily formulated out of testimony inadmissible in a court of law? If the Third Circuit is correct, what has become of a treble-damage defendant's right to have material factual issues tried to a jury? Surely questions of such import merit the immediate attention of this Court.

D. Conflicting Judicial Policies in Private Antitrust Enforcement

This case also involves the relationship between the two paragraphs—since 1955, the two subsections—which together constitute Section 5 of the Clayton Act. We have argued that the two subsections are related and dependent and that the purpose of the tolling provision was only to preserve the usefulness of a judgment or decree obtained in a government suit, if one eventuated, since, as the Seventh

Circuit has put it, a plaintiff "can derive no benefit from the pendency of the government's suit until a final decree has been entered therein." *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284, 290 (7th Cir., 1954); *Momand* v. *Universal Film Exchange*, 43 F, Supp. 996, 1012 (D. Mass., 1942).

Judge Augelli, on the other hand, assumed that Congress, by adopting Section 5(b), intended to grant to potential private plaintiffs the "advantage of facts uncovered" in governmental proceedings regardless of the outcome of the proceedings in which gathered. In this instance, the Court obviously overlooked the fact that antitrust enforcement arms do not, as a matter of course, make their investigative files available to potential private plaintiffs. Note, FTC Rules of Practice, 16 C. F. R. § 1.134.

Actually, there is no indication anywhere in the legislative history that Congress intended any more than what it granted in Section 5(a), namely, that private plaintiffs were to be accorded the use of judgments or decrees in litigated government cases as *prima facie* evidence in their own subsequent actions; nor has any previously decided case supported any notion that Section 5(b) includes a broader, independent Congressional purpose of encouraging private plaintiffs to await the outcome of a government proceeding to see if the government is able to uncover information "helpful" to later, private litigants.

Thus, as with the determinations as to whether an FTC proceeding is a "civil . . . proceeding . . . by the United States" or an FTC cease and desist order is "a final judgment or decree," the courts below have been faced with a novel question, *i.e.*, whether the tolling provision is broader than the *prima facie* evidence provision and independent of it. This question likewise requires determination by this Court because its resolution below is in conflict with previous interpretations and because there are policy considerations which indicate that private plaintiffs should be limited to the benefit that Congress expressly provided.

We know that from the beginning—that is, since 1914—Congress has intended to facilitate private actions in order to supplement enforcement of the antitrust laws. To encourage private suits, Congress not only provided for treble damage recoveries, but accorded private plaintiffs the benefit of government decrees as prima facie evidence. Nevertheless, there is room to argue that Congress did not view private suits as its primary policy but preferred, rather, when the two policies conflicted, to simplify government litigation by encouraging defendants to enter into consent decrees that would thereupon be unavailable to private plaintiffs. See *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 376 (D. C. Minn., 1939). If the statute of limitations is now to be tolled during the pendency of government "investigations" regardless of the outcome thereof, and if private plaintiffs are to be supplied with evidence from government investigations, private plaintiffs can be expected to await the result of government action, and the usefulness of private actions as an independent means of enforcement of the act will thus be diminished. Of course, it is also true that such a rule would forfeit a major present inducement to defendants in government cases to accept consent decrees.

Again, it is appropriate that such paradoxes in antitrust enforcement policies be referred to this Court.

Conclusion

Finally, it seems to us that this Court should hear this appeal in the interest of efficient administration of justice. Judge Augelli's original determination on our motion prompted the same argument to be made on behalf of other plaintiffs and has already required decisions by three other district courts and the Eighth Circuit. Since these other decisions are all contrary to the District and Circuit Court decisions in this case, the issues presented will continue to arise until this Court determines once and for all the rela-

tionship of administrative proceedings and administrative orders to Section 5 of the Clayton Act. It is for this reason that we apply for certiorari—to determine the issue in the case in which it first arose—and ask this Court to overcome its traditional reluctance to grant certiorari before a final disposition of the litigation. *Southwestern Sugar & Molasses Co., Inc.* v. *River Terminal Corp.*, 360 U. S. 411, 415-6 (1959). Cf. *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 374, 377 (1945); *Land* v. *Dollar*, 330 U. S. 731, 734 n2 (1947).

Thus, in view of the novelty and importance of the rulings below, of the immediate rejection of those rulings by the first three District Courts to face identical questions after Judge Augelli and of the resulting conflict with the decision of the Eighth Circuit in *Highland Supply, supra*, we submit that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SIDNEY P. HOWELL, JR.,
230 Park Avenue,
New York 17, New York.

CHARLES C. TRELEASE,
744 Broad Street,
Newark 2, New Jersey,
Attorneys for Petitioner.

EDWIN E. MCAMIS,
WINTHROP D. THIES,
REGAN GOLDFARB POWELL & QUINN,
New York, New York.

THOMAS J. LYONS,
St. Paul, Minnesota.
Of Counsel.

Judgment of the Court of Appeals Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,487

NEW JERSEY WOOD FINISHING COMPANY,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,

and

ESSEX WIRE CORPORATION,
MINNESOTA MINING AND
MANUFACTURING COMPANY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, *Chief Judge,* and MCLAUGHLIN and HASTIE, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order filed April 19, 1963, entered April 22, 1963, of the said District Court be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

May 20, 1964

Opinion of the Court of Appeals Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,487

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff-Appellee,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Appellant,

and ESSEX WIRE CORP.
Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 10, 1963

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 20, 1964)

By MCLAUGHLIN, *Circuit Judge.*

This is an interlocutory appeal under 28 U. S. C. Section 1292(b) from a denial of a defense motion to dismiss based on the statute of limitations.

Plaintiff-appellee is the New Jersey Wood Finishing Company (N. J. Wood), a New Jersey corporation engaged in the manufacture of certain electrical insulation products. Defendant-appellant is the Minnesota Mining and Manufacturing Company (3M), a Delaware Corpora-

tion, doing business in New Jersey and likewise engaged in the electrical insulation field.

On June 24, 1960, the Federal Trade Commission (FTC) had issued a complaint against 3M, charging that 3M "has violated and is now violating the provisions of Section 7 of the Clayton Act (U. S. C. Title 15, Section 18) as amended, * * *." That FTC complaint substantially alleged the following:

For a number of years prior to 1953, 3M was a highly diversified company, manufacturing and selling a number of product lines and segments thereof. From 1952 to 1956 3M began to acquire the operations of a number of manufacturers and various product groups, particularly in the electrical insulation field. During this period it also bought several distributor companies. In March 1956, 3M absorbed Prehler Companies, the second largest distributor (15% of sales) of electrical insulation products in the United States, and in August 1956, it absorbed Insulation and Wires, Inc. (IWI), the third largest such distributor (14% of sales). After obtaining these corporations, 3M became the largest such distributor, having around 29% of the total sales of electrical insulation products sold and distributed by electrical instrument distributors in the United States.

By these acquisitions, 3M further became the second largest distributor of seven (7) of the electrical insulation products it manufactured and had 18% of the total sales of these products. In 1958 3M's sales of these products through its acquired distributors, increased to about 21% of the total sales of said products, while the sale of those seven products by the largest electrical insulation distributor decreased to less than 21%.

By virtue of 3M's acquisition of these distributor corporations, other manufacturers who had previously dealt with Prehler and IWI found this market closed to them. Similarly other distributors, who had been supplied with products by 3M and the other manufacturers 3M acquired, found this source of supply cut off.

Opinion of the Court of Appeals Below

The FTC complaint asserted that the effect of the acquisitions of Prehler and IWI, and of each of them, by 3M may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution, and sale of electrical insulation products, individually and collectively in various sections of the country within the meaning of Section 7 of the Clayton Act as amended. The complaint thereafter specified these injurious effects.[1]

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[1] The aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in the following ways, among others:

1. Minnesota Mining, as the largest producer of electrical insulation tape, and with its acquisitions of leading manufacturers of other electrical insulation products, by acquiring two of the three largest distributors of electrical insulation products in the United States, has extended and integrated its business in such a manner as to substantially increase its position in the manufacture, sale and distribution of electrical insulation products; and it may exercise the inherent powers of its acquired position to substantially lessen competition or tend to create a monopoly in the manufacture, sale and distribution of electrical insulation products.

2. Manufacturers of electrical insulation products have been foreclosed from a substantial share of the market for said products.

3. Competition has been eliminated between Prehler and IWI in the distribution and sale of electrical insulation products in the sections of the country in which they were competing, and potential competition has been eliminated between said companies throughout the United States.

4. Actual and potential competition has been eliminated between Minnesota Mining and the two acquired distributors.

5. As a leading manufacturer and distributor of electrical insulation products Minnesota Mining has acquired a position whereby it may:

(a) Manipulate prices or use other means to lessen competition or tend to create a monopoly; and

(b) Concentrate the full impact of its sales, promotional and merchandising experience and ability on one of its electrical insulation products, or on one selected section of the country.

6. Concentration of the manufacture, sale and distribution of electrical insulation products may be increased.

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The FTC complaint concluded by charging that:

> "The foregoing acquisitions, acts and practices of respondent, * * * constitute a violation of Section 7 of the Clayton Act as amended and approved December 29, 1950:
>
> "WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 24th day of June, A. D. 1960 issues its complaint against said respondent."

Apparently before any testimony was taken, this FTC proceeding was terminated by consent order entered July 20, 1961, under which 3M was ordered inter alia to divest itself absolutely of all the assets of Insulation and Wires Division (IWI) of the Essex Wire Corporation and its related corporations.

On November 20, 1961, N. J. Wood filed its complaint in this action alleging that 3M had violated Section 1 and Section 2 of the Sherman Act (15 U. S. C. Section 1, 2 (1958)) and Section of the Clayton Act (15 U. S. C. 18 (1958)) to its (N. J. Wood's) injury, for which under Section 4 of the Clayton Act (15 U. S. C. 15 (1958)) it was entitled to treble damages. N. J. Wood claimed that 3M had acquired IWI in violation of these antitrust statutes and deprived it of a substantial national market for its products.

3M moved to strike N. J. Wood's complaint because the cause of action accrued more than four years before the commencement of the suit and was therefore barred by the statute of limitations. N. J. Wood opposed the motion, arguing that the statute was tolled under 5(b) of the Clayton Act by virtue of the FTC proceeding against 3M.

On March 19, 1963, an amended complaint was filed by direction of the court. Its gravemen is the same as are the controlling legal questions.

On the motion, the trial judge held that the proceeding by the FTC to enforce Section 7 of the Clayton Act

was a "civil or criminal proceeding * * * instituted by the United States" within the meaning of Section 5 of the Clayton Act (15 U. S. C. 16 (1958));[2] that the statute of limitations was therefore tolled and plaintiff's filing of the complaint in this cause against 3M was timely. New Jersey Wood Finishing Company *v.* Minnesota Mining & Manufacturing Company, 216 F. Supp. 507 (D. C. N. J. 1963).

N. J. Wood's claim arises in the first instance under Section 4 of the Clayton Act, which provides that "persons" injured by violations "of the antitrust laws" shall be entitled to threefold damages. 15 U. S. C. 15 (1958) "Anti-

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[2] The first paragraph of Section 5 (now 5(a) (15 U. S. C. 16 (a)) provides:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 4A."

The second paragraph of Section 5 (now 5(b)) (15 U. S. C. 16(b)) provides:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

trust laws" as that term is employed in Section 4 has a restricted meaning. Notwithstanding other antitrust acts prior or subsequent to the Clayton Act, private parties can recover under Section 4, only where their injury has resulted from acts in violation of the specific antitrust laws, itemized in Section 1 of the Act.[3] 15 U. S. C. 12 (1958); Nashville Milk Co. *v.* Carnation Co., 355 U. S. 373 (1958). The Sherman and Clayton Acts upon violations of which N. J. Wood's complaint is based, are "antitrust laws" within the meaning of Section 4. Other acts are not, including for our purposes, the Federal Trade Commission Act. See Samson Crane Co. *v.* Union National Sales, 87 F. Supp. 218 (D. C. Mass. 1949).

In its scheme for the enforcement of these "antitrust laws", Congress envisaged both public and private actions. United States *v.* Borden Co., 347 U. S. 514, 519 (1954); United States *v.* Cooper Corp., 312 U. S. 600, 608, 610 (1941); United States *v.* Bendix Home Appliances, 10 F. R. D. 73, 77 (S. D. N. Y. 1949); see 2 Toulmin's Antitrust Laws, Section 16.6 P. 91 (1949); MacIntyre, The Role of the Private Litigant in Antitrust Enforcement, 7 Antitrust Bulletin, P. 113, et seq. (1962). Through Section 4, the business public became an ally of government and the private antitrust suit, a substantial weapon of national antitrust policy. Cinnamon *v.* Abner A. Wolf, Inc., 215 F. Supp. 833, 834 (E. D. Mich. 1963), citing Report of the Attorney General's National Committee to Study the Antitrust Laws, P. 378 (1955). Congress had hoped that these

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[3] These "antitrust laws" are: The Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209); The Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730); and the Wilson Tariff Act (Act of August 27, 1894, c. 349, Section 73-77, 28 Stat. 57 as amended Act of February 12, 1913, c. 40, 37 Stat. 667).

private antitrust suits would supplement government actions and perhaps in some cases make them unnecessary.[4]

This broad plan of private and public actions is further detailed. The Sherman Act[5] contemplates civil (Sec-

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[4] "At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money.

"The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act * * *.

"Since the enactment of the Clayton Act, the bulk of private antitrust litigation has followed successful Government action, so that the judgments and decrees in the Federal proceedings could be used to establish a case. Amassing evidence (sic) for antitrust cases would otherwise be a prohibitively expensive task for most plaintiffs." S. Rep. No. 619, 84 Cong., 1st Sess. June 21, 1955; U. S. Code Cong. & Ad. News, 2329 (1955).

[5] The Sherman Act was the first piece of Federal Antitrust legislation. Passed in 1890, the act sought to protect commerce against unlawful restraints and monopolies, and preserve freedom of competition. Act of July 2, 1890, c. 647, 26 Stat. 209. Standard Oil *v.* United States, 221 U. S. 1, 50, 52 (1911). The era in which it was enacted was one "of trusts" and "combinations of business and capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." Apex Hosiery Co. *v.* Leader, 310 U. S. 469, 491-493 (1940). The Sherman Act was not only an immediate legislative answer to this threat, but a declaration of policy as well. It was basically a criminal statute, but Section 4 of that act also provided for enforcement by civil actions by the Justice Department through the various United States Attorneys. Section 7 also gave a private right of action for treble damages. This latter section was for practical purposes absorbed in Section 4 of the Clayton Act of 1914, but its repeal was not pronounced until 1955. Act of July 7, 1955, c. 283, § 3, 69 Stat. 283.

tion 4) and criminal (Section 3) actions by the Justice Department, and treble damage suits by private parties (Section 7). 15 U. S. C. Sections 3, 4, 15 (1958); but cf. Federal Trade Commission *v.* Cement Institute, 333 U. S. 683 (1948). Under the Clayton Act,[6] private actions may be in the form of suits for injunctive relief (Section 16) or for treble damages (Section 4). 15 U. S. C. Sections 26, 15 (1958); public actions, in the form of suits principally by the FTC and the Justice Department under Section 11 for violations of Sections 2, 3, 7 and 8 of that act. 15 U. S. C. 21 (1958).

To be distinguished is the role of the FTC under the FTC Act.

The Federal Trade Commission was established under the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717) and invested with both adjudicatory and investigatory functions. Under Section 5 (of the FTC Act) the FTC was empowered to order the discontinuance of "unfair methods of competition" and later "unfair * * * practices" which were declared "unlawful" by the Act. See the extensive legislative history in Judge Denison's partial dissent in L. B. Silver Co. *v.* Federal Trade Commission, 289 Fed. 985, 992-998 (6 Cir. 1923); Federal Trade Commission *v.* Klesner, 280

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[6] The Sherman Act applied solely to consummated contracts and conspiracies. Standard Oil Co. *v.* United States, 221 U. S. 1, 58 (1911); Standard Fashion Co. *v.* Magrane-Houston Co., 258 U. S. 346, 355 (1922). In 1914, Congress enacted the Clayton Act which sought to reach certain specific practices, considered dangerous to free competition in commerce and trade, but not covered by the Sherman Act. Act of October 15, 1914, c. 323, 38 Stat. 730. Standard Fashion Company *v.* Magrane-Houston Co., 258 U. S. 346, 356 (1922); Corn Products Refining Co. *v.* Federal Trade Commission, 324 U. S. 726, 738 (1945). It was thought that by making these practices illegal, the creation of trusts, conspiracies and monopolies would be arrested in their inception. See United States *v.* United Shoe Machinery Co., 264 Fed. 138, 162 (E. D. Mo. 1920), quoting the report of the Senate Committee.

U. S. 19 (1929); Federal Trade Commission *v.* Raladam Co., 283 U. S. 643, 647 (1931). Purposefully left broad and generally undefined (as to what constituted an "unfair method of competition" or an "unfair practice"), Section 5 proceeded on the idea of an administrative body of experts (the FTC) which, given a flexible standard of judgment, would discover and prevent the use of such practice before it worked a Sherman violation. See Federal Trade Commission *v.* Motion Picture Advertising Service Co., 344 U. S. 392, 394 (1953); Federal Trade Commission *v.* Raladam Co., 283 U. S. 643, 648 (1931); see Beer, Federal Trade Law and Practice (1942) P. 76-77. The Sherman Act was to serve as a guide for the Commission, as a "declaration of policy", to be considered in determining what constituted an unfair method of competition. Federal Trade Commission *v.* Beech Nut Packing Co., 257 U. S. 441 (1922); Standard Oil Co. *v.* Federal Trade Commission, 282 Fed. 81, 86-87 (3 Cir. 1922) affirmed 261 U. S. 463 (1923).

Within this area of "unfair methods of competition", the FTC Act and the Clayton Act overlap. At the time of the enactment of the Clayton Act, it was believed that its specific prohibitions particularly Section 2 and Section 3 (15 U. S. C. Sections 13, 14 (1958)) would be covered by Section 5 of the FTC Act. However, Congress, by declaring these practices unlawful specifically in the Clayton Act, took away from the Commission its informed judgment respecting them.[7] These "unfair methods of com-

[7] From the House version of the Clayton bill (H. R. 15657) the Senate Committee had stricken what eventually became Sections 2 and 3 of the Act because it felt that these "unfair methods of competition" would be covered by Section 5 of the FTC Act. A long debate ensued in the Senate. See 13963, 14088-14100; 14200-14229; 14249-14276 (1914). Finally the Senate voted to restore them to the Clayton bill, mainly for the reasons stated by Senator Clapp: to declare these practices unlawful specifically and withdraw them from the judgment of the commission. 51 Cong. Rec. 14257 (1914).

petition (later amended to include "unfair * * * practices"), whether prohibited specifically under the Clayton Act, or generally under the FTC Act, were to be restrained according to a congressional design. While Section 5 of the FTC Act was to be enforced by the FTC, Section 11 of the Clayton Act provided a scheme of dual enforcement of Sections 2, 3, 7 and 8 of that act, by the FTC and the Justice Department; and while the underlying substantive violation of Section 5 (FTC Act) did not give rise to a private right of action (the FTC Act was not an antitrust law within the meaning of Clayton Section 4), a violation of Sections 2, 3, 7 and 8 did, no matter by which agency, if either of them, they were enforced. In short, the FTC Act bolstered the Clayton and Sherman Acts both by restraining evils, which might also constitute violations of those acts, and by reaching areas not covered by their proscriptions. These three acts are "interlaced" remedially as well as substantively evincing a Congressional desire for a "cumulative remedy" for the threats and dangers to trade and competition. See Federal Trade Commission *v.* Cement Institute, 333 U. S. 683, 694-695 (1948); United States *v.* Borden Company, 347 U. S. 514, 518 (1954). 51 Cong. Rec. 16274-16275 (1914). The question here presented concerns in part the "cumulative remedy" Congress provided for the violation of Section 7 of the Clayton Act. In the case at bar, both the FTC (under Section 11) and N. J. Wood (under Section 4) had brought actions based on the violation of Section 7. N. J. Wood claims that, by virtue of the FTC proceeding, it is entitled to the benefits of Section 5 of the Clayton Act. Section 5 is auxiliary to Section 4 and provides for the tolling of the statute of limitations in favor of potential private suitors during the pendency of certain government antitrust units. 3M, however, contends that the FTC proceeding is not a proceeding instituted by the United States within the meaning of Section 5.

As we indicated above, specifically granted in Section 11 of the Clayton Act, (15 U. S. C. 21 (1958)), was the jurisdiction of the FTC to enforce compliance with Sections 2, 3, 7 and 8 of the Act, (15 U. S. C. 13, 14, 18, 19 (1958)) to be shared concurrently with the Justice Department. (See footnote 12 infra). United States *v.* W. T. Grant Co., 345 U. S. 629, 632 (1953); Standard Oil Co. *v.* United States, 337 U. S. 293, 310 (Note 13) (1949); United States Alkali Export Association, Inc. *v.* United States, 325 U. S. 196 (1945). In the latter opinion, at P. 206-209 Chief Justice Stone described the enforcement of these provisions as one of "efficient cooperation" between the "two agencies". This relationship was further cemented in 1950 when Congress amended Section 11, giving the Attorney General the right to intervene in an FTC Clayton Act proceeding. Act of December 29, 1959, c. 1184, 64 Stat. 1125; House Report No. 1191, August 4, 1949, 81 Cong., 1st Session; S. Report No. 1775 June 2, 1950 81st Cong. 2d Session. See also Final Report of Attorney General's National Committee to study Antitrust Laws, G. P. O. March 1955, at P. 375, et seq. We believe that when Congress vested authority in the FTC to enforce the Clayton Act provisions, it designated the FTC as a "representative of the United States" having "authority to represent its interest in a final adjudication" of an alleged Clayton antitrust violation. Sunshine Coal Co. *v.* Atkins, 310 U. S. 381 (1940); United States *v.* Willard Tablet Co., 141 F. 2d 141 (7 Cir. 1944); United States *v.* R. C. A., 358 U. S. 334 (1959). In the latter case, the Supreme Court held that because the Federal Communications Commission (FCC) had not the power and authority to decide the antitrust issue there presented, the United States would not be estopped by any determination made therein. Underwritten in that decision is the thought that if the FCC had the power and authority to decide those antitrust issues, FCC would have been regarded in that instance

as a representative of the United States.[8] R. C. A. case, supra, P. 352. This clearly negates the proposition offered by 3M in this appeal, that suits by the United States and proceedings by the FTC must be regarded as distinct, because "agency determinations do not bar antitrust suits". The cases cited by 3M[9] deal fundamentally with questions of primary jurisdiction over matters having antitrust implications. They hold merely that agency determinations in proceedings brought in regulation of other laws (e.g., Interstate Commerce Act, Natural Gas Act) without authority to adjudicate antitrust issues will not bar antitrust suits by the United States. Cf. Pan American Airways *v.* United States, 371 U. S. 296 (1963). In the FTC proceeding at issue, where the Commission under Section 11 was directly given such authority to enforce the Clayton Act, such action must be regarded as one on behalf of the United States, the interests of which are now further protected by Attorney General's right of intervention.

Any argument that an FTC proceeding is not a suit by the United States must meet the reality that whether the Commission functions under the Clayton or the FTC Act, it does so in the public interest and as an administrative arm of the Government. See 16 C. F. R. Section 1.21 Rules of Practice of the Federal Trade Commission; Federal Trade Commission *v.* Cement Institute, 333 U. S. 683, 692-693 (1948); Federal Trade Commission *v.* Gratz, 253 U. S. 421, 432, 435 (1920), Justice Brandeis dissenting but not as to the functioning of the Commission; certainly an

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[8] We do not consider that Section 11(c) of the Clayton Act or the case of United States *v.* W. T. Grant, 345 U. S. 629, 632 (1953) compels the conclusion that both the FTC and the Justice Department can bring separate proceedings against a single defendant for the same alleged violation under Section 11. Rather Section 11(c) would seem to indicate that a suit by the FTC under Section 11 should not work to relieve a defendant from a private antitrust suit. 15 U. S. C. 21(c) (1958). See 51 Cong. Rec. 16274 (1914).

[9] Georgia *v.* Pennsylvania R. Co., 324 U. S. 439 (1959); United States *v.* Borden Co., 308 U. S. 188 (1939); California *v.* Federal Power Commission, 369 U. S. 482 (1962).

FTC proceeding under Section 11 of the Clayton Act should not be rendered an anomaly in the Congressional plan for "antitrust law" enforcement. This plan definitely contemplates private and public actions, with some of these public actions, being brought by the FTC under Section 11. As Judge Augelli succinctly phrased it below:

> "It certainly would seem not to have been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstances of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical." New Jersey Wood Finishing Co. *v.* Minnesota Mining and Manufacturing Co., 216 F. Supp. 507, 510 (D. C. N. J. 1963).

The sole reason for Section 5 of the Clayton Act was to stimulate private antitrust suits (see footnote 4) and aid such private suitors. As it appears that the FTC is the primary enforcing agency of Section 7 of the Clayton Act (see United States *v.* Philadelphia National Bank, 374 U. S. 321 (1963)),[10] to hold that such a proceeding was

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[10] Opinion by Mr. Justice Brennan at P. 346:

"The legislative history shows that the objective of including the phrase 'corporation subject to the jurisdiction of the Federal Trade Commission' in Section 7 was not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section. The predominant focus of the hearings, debates, and committee reports was upon the powers of the FTC * * * Furthermore, although the Clayton Act has always provided for dual enforcement by court and agency (cites), prior to the 1950 amendment, enforcement of Section 7 was left largely to the FTC. Martin, Mergers and the Clayton Act (1959) 205, 219; Montague, The Cellar Anti-Merger Act; An Administrative Problem in an Economic Crisis, 37 A. B. A. J. 253 (1951). And the impetus to amend Section 7 came in large part from the FTC (cites). Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction." See also Mr. Justice Harlan's dissent at p. 392, supra.

not within Section 5(b) would thwart in part the Congressional scheme for the enforcement of Section 7. We think it must follow that a Section 4 private right is preserved by a Government action to enforce Section 7, whether that action is brought by the Justice Department or the FTC; that it is not a question whether it is a judicial or an administrative proceeding but rather whether it is a proceeding on behalf of the United States to enforce the "antitrust laws".

It is also asserted that an action by the FTC is not a "proceeding in equity", as Section 5 originally provided.[11] Certainly, when the Justice Department seeks an injunction against a defendant for violation of the Clayton Act, its purpose is to prevent irreparable injury to the public weal by the traditional equitable remedy. Section 15 of the Clayton Act, 15 U. S. C. 25 (1958); United States *v.* Borden Co., 347 U. S. 514, 518 (1954). The effect of the FTC proceeding is essentially the same, by virtue of the 1959 amendment to Section 11, hereinafter referred to as the Finality Act of 1959.[12] Act of July 23, 1959, Pub-L

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[11] See footnote 2. Section 5 now reads "civil * * * proceeding" instead of "suit or proceeding in equity".

[12] Section 11 provides:

"(a) That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: * * * in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

"(b) Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person [and the Attorney General (amended Dec. 29, 1950, c. 1184, 64 Stat. 1125] a complaint stating its charges in that respect, and containing a notice of a hearing * * *. The person so complained of shall have the right to appear * * * and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. [The Attorney

(Footnote continued on next page)

86-107, Section 1, 73 Stat. 243. Formerly the FTC had to seek the enforcement of its order—after its determination of a Clayton Act violation, and a subsequent violation of the order (See Federal Trade Commission *v.* Ruberoid Co., 343 U. S. 470 (1952))—by a petition to the Court of Appeals; but now enforcement decrees by the Circuit Court of Appeals are unnecessary and the orders become final and self-executing by the expiration of defendant's time to seek review.

General shall have the right to intervene and appear in said proceeding (amended, 64 Stat. 1125)]. * * * If upon such hearing, the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * *.

"(c) (as amended by the Finalty Act of 1959, 73 Stat. 243). Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the Court of Appeals of the United States * * * by filing with the court * * * a written petition praying that the order of the commission or board be set aside. * * * Upon such filing of the petition the court * * * shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, * * * To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. * * * The judgment and decree of the court shall be final except that the same shall be subject to review by the Supreme Court upon certiorari * * *.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify or set aside orders of the commission or board shall be exclusive.

"(e) * * * No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

"(f) * * *

"(g) Any order issued under subsection (b) shall become final—

(Footnote continued on next page)

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The legislative history of the FTC Act and the Clayton Act, indicates that the FTC cease and desist order originally was to be more in the nature of "notice" of violation than an injunctive measure. The bare order had "no effect in itself, unless made operative by the Circuit Court of Appeals, * * *." Proper *v.* John Bene and Sons, Inc., 295 Fed. 729, 731 (E. D. N. Y. 1923). The FTC functioned as an investigatory body which would judge and note violations of the Acts. In formulating its findings and order, it presented itself in a manner analogous to a Master in Equity to the Court of Appeals [See address of William H. Taft, of October 20, 1914, reported in New York Times, October 21, 1914, P. 5] which sat not as an Appellate Court but as a court of equity enforcing, modifying or setting aside the orders of the FTC. C. E. Niehoff & Co. *v.* Federal Trade Commission, 241 F. 2d 37, 42 (7 Cir. 1957); Federal Trade Commission *v.* Fairyfoot Products Co., 94 F. 2d 844 (7 Cir. 1938); Butterick *v.* Federal Trade Commission, 4 F. 2d 910 (2 Cir. 1925); L. B. Silver *v.* Federal Trade Commission, 292 Fed. 752, 753 (6 Cir. 1923). See e.g. 51 Cong. Rec. 14927, 14768-70, 14251-52, 16281 (1914), H. Rep. No. 1142, 63 Cong. 2d Sess. p. 19;

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(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

(2) * * *

(3) * * *

(4) * * *

"(h) * * *

"(i) * * *

"(j) * * *

"(k) * * *

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation which shall accrue to the United States and may be recovered in a civil action brought by the United States. * * *"

Henderson, Federal Trade Commission (1924) pp. 77-78. In addition to examining the prospective application of the order, restraining the violation of the Act, the Court of Appeals had to determine the legality of the order, whether the facts properly found by the FTC constituted a violation of the Act. See Federal Trade Commission *v.* Broch and Co., 368 U. S. 360, 364 (1962); Federal Trade Commission *v.* Ruberoid Co., 343 U. S. 470, 473-474 (1952); Jacob Siegel Co. *v.* Federal Trade Commission, 327 U. S. 608, 612 (1946); Federal Trade Commission *v.* Fairyfoot Products Co., 94 F. 2d 844 (7 Cir. 1938); See Beer, supra p. 420. By virtue of the Finality Act, if judicial review is not sought, the cease and desist order becomes final, and an adjudication that a violation of the Clayton Act has been committed. That act brought to Clayton Act-FTC orders the same binding effect that had been given FTC orders under the FTC Act. See Federal Trade Commission *v.* Morton Salt Co., 334 U. S. 37, 54 (1948); United States *v.* Willard Tablet Co., 141 F. 2d 141, 143 (7 Cir. 1944); George H. Lee Co. *v.* Federal Trade Commission, 113 F. 2d 583 (8 Cir. 1940); United States *v. Piuma*, 40 F. Supp. 119 (S. D. Calif. 1941); affirmed 126 F. 2d 601 (9 Cir. 1942); See 152 ALR Anno. 1198 (1944).

The "proceeding in equity" therefore was not the Commission proceeding but the proceeding before the Court of Appeals from which a judgment or decree would issue determining and restraining a violation of the Act. With development of "final orders" in FTC proceedings, whether the order becomes final by expiration of time in which to seek review or by a judgment or decree from a Court of Appeals, the proceeding resulting in such final order or decree, is a "proceeding in equity" and a "civil proceeding" within the meaning of Section 5, and an adjudication of a violation of the Clayton Act.

The vital effect of these changes is overlooked by appellant in its strong reliance upon the 1923 decision in Prope[illegible]. John Bene and Sons, Inc., 295 Fed. 729 (E. D.

N. Y. 1923). That opinion held that a FTC proceeding under the FTC Act is not a "proceeding in equity • • • instituted by the United States" to restrain violations of the "antitrust laws" within Section 5 of Clayton Act. In Proper, the plaintiff brought a private antitrust suit for treble damages for violations of the Clayton, Sherman and FTC Acts. A proceeding had been brought against the defendant by the FTC under the FTC Act and the plaintiff sought to have the bare FTC order, unenforced by the courts, admitted as prima facie evidence under Section 5.

The court denied it for several reasons: that the proceeding before the Commission was not a "proceeding in equity"; that the FTC order was not a "final judgment or decree"; that the proceeding by the FTC to enforce Section 5 of the FTC Act was not a suit under the antitrust laws as that term is used in Section 5 of the Clayton Act. There are no findings in Proper contrary to our conception of the law as it stood in 1923. The Court in Proper dealt with a 1923 FTC proceeding under the FTC Act. We have before us a proceeding under the Clayton Act brought by an expanded 1960 FTC.

With that thoroughly in mind, the 1945 decision of Brunswick-Balke Collender Co. *v.* American Bowling and Billiard Corp., 150 F. 2d 69 (2 Cir. 1945) cited by Judge Augelli below, becomes far more reflective of the problem presented by this appeal. There the Court held that an FTC proceeding brought for violations of Section 3 of the Clayton Act was a "final judgment or decree" rendered in a "suit or proceeding in equity brought by or on behalf of the United States" within Section 5 of the Act. In so deciding, the Court had mistaken the scope of the Act of March 21, 1938, c. 49, 52 Stat. 111. 15 U. S. C. 45 (1958). That statute did not amend Section 11 of the Clayton Act but only Section 5 of the FTC Act, and on rehearing the Court reversed itself, concluding that because the order was not "final", it was inadmissible as prima facie evidence under Clayton Section 5, citing Proper *v.* John

Bene & Sons, Inc., supra. It is obvious that if the order had been final, as it is today, (by virtue of the Finality Act), the Court would have regarded the "final order" admissible under Section 5. See Fifth and Walnut *v.* Loew's, Inc., 176 F. 2d 589, 593 (footnote 9) (2 Cir. 1949).

3M has argued that Section 5(b) (the tolling provision) is dependent upon Section 5(a) (the prima facie evidence provision), and that the two subsections must be construed as a unit. One theory advanced is that the express statement in Section 5(a): That this section shall not apply to "consent judgments or decrees" should be brought down to Section 5(b) and interpreted so as to prevent the tolling of the statute of limitations where the civil or criminal proceeding is terminated by a consent order. Apart from the legislative history which negates such construction 51 Cong. Rec. 15825-15826; 16046-47; 16276 (1914), it would seem that if the proviso were to apply to both paragraphs, there would be no reason to insert it after the first. As the district court further pointed out: "The proviso is grammatically a part of the single sentence which comprises Section 5(a), separated only by a colon." See Flora *v.* United States, 362 U. S. 154, 150 (1960). More important is the substantive application of the consent judgment proviso. While the proviso deals with the termination of the government suit, the tolling provision operates during its "pendency". Section 5(a) permits the use of government judgments and decrees as prima facie evidence, only as to matters actually decided in the government suit. Emich Motors Corp. *v.* General Motors, 340 U. S. 558 (1951). 5(b) tolls the statute of limitations as to "matters complained of" whether or not they are actually decided. Union Carbide and Carbon Corp. *v.* Nisley, 300 F. 2d 561 (10 Cir. 1962). To construe this section as appellant desires, would be to force every private antitrust claimant caught between the running of the statute and the possible consent termination of the government proceeding, to start suit without the benefits of the government action. See Twin Ports Oil Co. *v.* Pure

Oil Co., 26 F. Supp. 366, 372-376 (D. C. Minn. 1939), affirmed on other grounds, 119 F. 2d 747 (8 Cir. 1941); Twentieth Century-Fox Film Corp. *v.* Brookside Theatre Corp., 194 F. 2d 846 (8 Cir. 1952).

The defendant 3M also suggests that proceedings which cannot yield judgments and decrees applicable as prima facie evidence under Section 5(a) cannot toll the statute of limitations under Section 5(b). The legislative history is sparse on the interrelationship between the two sections. The only clear Congressional commentary on this point occurred in the debates on the House Clayton bill, (51 Cong. Rec. 9165, 9488-90 (1914)), which had no provision for the enforcement of its sections by the FTC; [See H. Rep. No. 627, 63 Cong. 2d Sess. (1914)]; so that the question whether FTC proceedings to enforce the Clayton provisions tolled the statute of limitations was not squarely met by the 1914 legislators. The House debates support 3M's view solely to the extent that the tolling provision was to enable the private claimant to reap the benefits of the government action, i.e., the use of a government judgment and decree as prima facie evidence. Union Carbide & Carbon Corp. *v.* Nisely, 300 F. 2d 561 (10 Cir. 1962). But see 51 Cong. Rec. 16003 (1914). In addition to the decisions noted infra (see footnote 14, infra), other courts have regarded the two subsections as related and dependent. See Sun Theatre *v.* R. K. O. Radio Pictures, 213 F. 2d 284, 289-293 (7 Cir. 1951); Momand *v.* Universal Film Exchange, 43 F. Supp. 996, 1012 (D. C. Mass. 1942), affirmed 172 F. 2d 37 (1 Cir. 1948). However, we see no reason why final FTC orders enforcing the Clayton Act should not be admitted as prima facie evidence under Section 5(a). Brunswick-Balke Collender Co. *v.* American Bowling and Billiard Corp., 150 F. 2d 69 (2 Cir. 1945). But cf. United States *v.* United Shoe Machinery Corp., 89 F. Supp. 349, 356 (D. C. Mass. 1950). (Final disposition of case 110 F. Supp. 294 (D. C. Mass. 1953), affirmed per curiam 346 U. S. 894 (1953)). While our 1914 legislators would not have accepted a bare

FTC order of that period as admissible, the finality given such order through a decree emanating from the Court of Appeals would have resulted in its being considered a "final judgment or decree", within Section 5(a). Today of course, under the Finality Act, the orders of the FTC become final adjudications of antitrust violations by expiration of the time in which review can be sought.

The operation of Section 5(a) has been explained to some extent by Emich Motors Corp. *v.* General Motors, 340 U. S. 558 (1951). Judgments and decrees in government suits are only prima facie evidence of antitrust violations. The defendant still has his "day in Court" on that issue. See Harrison *v.* Paramount Pictures, 115 F. Supp. 312 (E. D. Pa. 1953), affirmed 211 F. 2d 405 (3 Cir. 1954). He is entitled to offer rebuttal evidence to break down the force and effect of that prima facie evidence. 51 Cong. Rec. 13856-13858 (1914); see the authorities collected in Richfield Oil Corp. *v.* Karseal Corp., 271 F. 2d 709, 716-727 (9 Cir. 1959). See also 65 Harv. L. Rev. 1400 (1952). 3M argues that FTC orders cannot be admitted because of the more liberal evidentiary rules of the administrative agency. This plus the broader administrative process might place the FTC proceeding on a somewhat unequal footing with a similar judicial proceeding brought by the Department of Justice. See United States *v.* Morton Salt Co., 338 U. S. 632, 641-643 (1950); Hunt Foods & Industries, Inc. *v.* Federal Trade Commission, 286 F. 2d 803 (9 Cir. 1961). But see United States *v.* Household Goods Movers Investigation, 184 F. Supp. 689 (D. C. D. C. 1960). The differences are at most peripheral and any attack along those lines would go to the weight of the prima facie evidence, not to its propriety. The use of administrative orders as prima facie evidence in private suits is not new to our law. Under the Interstate Commerce Act, 49 U. S. C. Section 16 (13) (1958) a reparation order of the ICC is admissible as prima facie evidence in an action for damages by a shipper against a defendant railroad, found

by the ICC to have exacted unreasonable rates.[13] Meeker & Co., *v.* Lehigh Valley R. R., 236 U. S. 412, 430 (1915); Pennsylvania R. Co. *v.* Weber, 257 U. S. 85 (1921); Western Maryland Ry. *v.* Penn Veneer Co., 92 F. 2d 146 (3 Cir. 1937). While we are satisfied that final orders in FTC Clayton Act proceedings are admissible under Section 5(a) as prima facie evidence, in the case at bar, N. J. Wood will not get the benefit of Section 5(a) because the FTC proceeding involved ended in a consent order, apparently before any testimony was taken. We have reached this question solely because there was some evidence in the

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[13] When the FTC bill reported out of the Senate Committee June 13, 1914 [S. Rep. No. 597, 63 Cong. 2d Sess. 1914)], it reflected a desire for a Commission with the same "effective powers and usefulness as had been given the ICC." 51 Cong. Rec. 10376 (1914). The floor debates in the Senate reveal a recurring Congressional feeling for an FTC functioning like the ICC. Distinctions and similarities were consistently noted. Representative Covington said:

> "There is, however, a perfect analogy between the former power of the Interstate Commerce Commission under the Cullom Act and the power of the Federal Trade Commission. Under the Cullom Act, the Interstate Commerce Commission had the power to determine whether an existing rate was unreasonable, and, if it is so found, to order the railroad to cease and desist from charging that rate.
>
> "The Federal Trade Commission will have precisely similar power in regard to an existing method of competition. It is instructive therefore to bear in mind that the orders of the Commission under that act were not final but were subject to review by the courts." 51 Cong. Rec. 14932 (1914).

Also, in the Senate report in the Clayton Bill (S. Rep. No. 698, 63 Cong. 2d Sess. 1914), the Committee recommended the change in Section 5(a) from "conclusive evidence" to "prima facie evidence". At P. 45, it drew the analogy of the use of a tax deed as evidence of title, citing Cooley in Taxation, 521 5th Ed. 1886, and Marx *v.* Hanthorn, 148 U. S. 172, 183 (1893). These same thoughts are expressed in the ICC-Meeker case, supra, which cites Marx *v.* Hanthorn. Such Congressional thinking tends to show that the 1914 legislator would not be adverse to the use of affirmed FTC orders as prima facie evidence.

legislative history of the section that the two subsections are to be construed together, as other courts have subsequently held. However, the decision of the court below that the two subsections should not be regarded as *inter* dependent does have substantial support.

The above mentioned intention in 1914 does not seem as plain in 1955 when Congress amended Section 5 and divided Section 5 into subsections (a) and (b). Act of July 7, 1955, c. 283, Section 2, 69 Stat. 283. The committee reports on the 1955 amendment to Section 5, plainly intimated a broader reason for tolling the statute of limitations. By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor. See Theatre Enterprises, Inc. *v.* Paramount Film Distributing Corp., 346 U. S. 537 (1954); Partmar Corp. *v.* Paramount Pictures Theatres Corp., 347 U. S. 89, 102-103 (1954). The real importance of government proceedings that accrues today to private suitors is the availability to them of the government's case against the defendant. Section 5(b) enables "a plaintiff to take advantage of facts uncovered" as a result of the government proceedings. New Jersey Wood Finishing Co. *v.* Minnesota Mining & Manufacturing Co., 216 F. Supp. 507 at P. 510 (D. C. N. J. 1963). In the Senate Report on the 1955 amendment to Section 5 (b) the Committee wrote:

> "Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint". Senate Report No. 619, June 21, 1955, U. S. Code Cong. & Ad. News, 84 Cong. 1st Sess. P. 2332.

Whether or not this shift in congressional intent was there fully outlined, it seems to us that FTC orders and

FTC proceedings presently enjoy the efficacy of court proceedings for purposes of Section 5, and that in this appeal the FTC proceeding against 3M to restrain a violation of Clayton Section 7, tolled the statute of limitations and that N. J. Wood's complaint was timely.

Three recent decisions[14] on the issue before us all relied on the old Proper case, supra, and summarily rejected the Brunswick Balke-Collender opinion. In so doing, those courts clearly overlooked the affirmative statutory distinction between FTC proceedings under the FTC Act and under the Clayton Act and that distinction's vital effect upon Section 4 and Section 5 of the Clayton Act; otherwise they could not have reasonably adopted the obsolete Proper rule. To do so at this stage is to consider the present question in a vacuum and simply forget all about the present governing statutory formula for the enforcement of the Clayton Act and the increased powers that have come to the FTC.

It is also clear that the status of the Brunswick-Balke opinion of Judge Frank was fundamentally misunderstood. The sound legal principle there pronounced that final FTC orders in Clayton Act proceedings are admissible within Section 5(a), was not reversed. It was simply not usable because, as was discovered, there was no Finalty Act at the time, dealing with FTC-Clayton Act orders. When Congress passed the Finalty Act in 1959, it simply vitalized the principle of Brunswick-Balke as to Section 5(a). We are satisfied that this principle is good law and good common sense and that its logical extension is applicable to the Section 5(b) question here involved.

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[14] Highland Supply Corporation *v.* Reynolds Metals Company, 221 F. Supp. 15 (E. D. Mo. 1963), reversed in part (but affirmed on the issue at bar) 327 F. 2d 725 (8 Cir. 1964); Volasco Products Co. *v.* Lloyd A. Fry Roofing Company, 223 F. Supp. 712 (E. D. Tenn. 1963); Farmington Dowel Products Co. *v.* Forster Mfg. Co., Inc., 223 F. Supp. 967 (D. C. Me. 1963)

Finally, 3M claims that even if the FTC proceeding tolled the statute of limitations, it preserved only the Clayton counts and the Sherman counts are barred. The statutory language of Section 5(b) tolls the statute as to "any matter complained of" in the Government suit. One of the overt acts upon which N. J. Wood's conspiracy count was based was the acquisition of IWI by 3M.[13] While "contract of conspiracy" was not at issue before the FTC, the acquisition of IWI was. N. J. Wood's complaint alleges that this act of acquisition was in furtherance of a conspiracy to restrain competition and to monopolize trade. There was a "substantial identity of subject matter." Union Carbide and Carbon Corporation *v.* Nisley, 300 F. 2d 561, 570 (10 Cir. 1962). We, therefore hold that the acquisition of IWI was a "matter complained of" within Section 5(b) and that the statute of limitations was tolled as to the Sherman as well as the Clayton counts. Union Carbide, supra; Steiner *v.* 20th Century-Fox Film Corporation, 232 F. 2d 190, 196 (9 Cir. 1956).

The judgment of the District Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[13] Defendant Essex Wire is not before us on appeal, but it appears from the record that the trial judge below dismissed it with prejudice only as to the Clayton counts and not as to the Sherman counts. Though we do not decide the question, it would appear that the statute of limitations is tolled only as to named defendants in the Government suit. Sun Theatre Corp. *v.* R. K. O. Radio Pictures, 213 F. 2d 284 (7 Cir. 1954); Momand *v.* Universal Film Exchanges, 172 F. 2d 37 (1 Cir. 1948).

No. 291.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

v.

NEW JERSEY WOOD FINISHING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION OF REYNOLDS METALS COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Reynolds Metals Company hereby respectfully moves for leave to file the accompanying brief *amicus curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The attorneys for the respondent have stated by letter to undersigned counsel that they decline to consent, but "would not oppose" this motion.

Movant is directly interested in the case because it is the defendant in a treble-damage suit, **Highland Supply Corporation v. Reynolds Metals Co.**, Civ. No. 63 C 53(2), now pending in the United States District Court for the Eastern District of Missouri, in which the exact issue to be determined in this case is presented—whether Federal

Trade Commission proceedings toll the federal four-year statute of limitations under § 5 (b) of the Clayton Act (15 U. S. C., § 16 (b)). The United States Court of Appeals for the Eighth Circuit answered this question in the negative on February 13, 1964. **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725. The court below answered this question in the affirmative on May 20, 1964, thus creating a direct conflict between the Eighth and Third Circuits.

In the Eighth Circuit case, the court of appeals, while holding that FTC proceedings do not toll the statute of limitations, remanded the case to allow the plaintiff an opportunity to amend its complaint. Plaintiff declined to seek *certiorari*, and on remand filed an amended complaint. Movant here has filed in the district court a motion to dismiss the amended complaint, which motion is now under submission. Thus, the case in which movant is involved is still very much alive. Presumably, if this Court were to affirm the lower court in this case, plaintiff in the Eighth Circuit case would request reconsideration of the same issue in that case. Such an eventuality would drastically alter the issues in that case, and could greatly increase movant's potential liability. Thus, movant has a clear, direct monetary interest in the decision of this case.

Movant believes that it can make a definite contribution to the Court's analysis of the statute in question because movant's case presents an issue which is not raised by the facts of this case but which, movant contends, will necessarily be decided by this case, and in fact was decided by the Third Circuit. That issue is whether an FTC order is admissible as *prima facie* evidence under § 5 (a) of the Clayton Act (15 U. S. C., § 16 (a)). In the case at bar, the FTC proceedings resulted in a consent order which is clearly not admissible as *prima facie* evidence because the proviso to § 5 (a) excludes from its scope

"consent judgments or decrees entered before any testimony has been taken." (Emphasis added.) . In the **Highland Supply** case, on the other hand, the FTC proceedings were contested, and the order was enforced (after modification) by the court of appeals.

While the issue of admissibility was not directly before the Third Circuit, it is inextricably intertwined with the tolling issue. Movant's brief contends, *inter alia,* that: (1) the tolling provisions of § 5 (b) are designed to facilitate use of a judgment or decree admissible as *prima facie* evidence under § 5 (a); (2) FTC orders are not so admissible; (3) therefore FTC proceedings do not toll the statute of limitations.

Because the two issues are so intertwined, it is not surprising that the Third Circuit decided the issue of admissibility as well as tolling, even though it was not directly presented. The opinion of the Third Circuit, in passing, has apparently ruled that either the FTC order itself, or the judicially enforced order, or both, would somehow be admissible as *prima facie* evidence. It may be foreseen that this Court, also, in deciding the tolling question, will decide the admissibility question; indeed, that is Question No. 2 of the Questions Presented by the Petition for Certiorari. Yet petitioner has briefed that issue only collaterally. Movant has a direct interest in that issue, and the attached brief discusses the issue fully.

Movant believes that its direct briefing of § 5 (a) will be of substantial value to the Court because: (1) Prior to the district court decision in this case, all of the cases on § 5 of the Clayton Act directly involved only § 5 (a); (2) Most of the secondary authorities discuss § 5 (a) only; (3) Much of the applicable legislative history deals with § 5 (a); (4) The question of the admissibility of administrative orders in judicial proceedings as *prima facie* evidence raises questions as to the use of hearsay and other non-

judicial evidence in administrative proceedings, which questions are not raised by the limitations issue. These issues are fully and directly discussed in movant's brief, together with authorities demonstrating the interdependence of the two subsections of § 5.

Wherefore, movant prays that this Court enter its order granting leave to file the attached brief.

Respectfully submitted,

REYNOLDS METALS COMPANY,

By LEWIS C. GREEN,
ALAN G. KIMBRELL,
GREEN, HENNINGS, HENRY,
EVANS & ARNOLD,
1530 Boatmen's Bank Building,
St. Louis, Missouri 63102,
CEntral 1-4181,
Attorneys for Reynolds Metals Company.

Of Counsel:
GUSTAV B. MARGRAF,
W. TOBIN LENNON,
Reynolds Metals Company,
Reynolds Metals Building,
Richmond 18, Virginia.

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No. 291.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

v.

NEW JERSEY WOOD FINISHING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR REYNOLDS METALS COMPANY AS AMICUS CURIAE.

Reynolds Metals Company, with leave of this Court, respectfully presents this brief in support of the petitioner.

INTEREST OF AMICUS CURIAE.

The interest of Reynolds Metals Company as *amicus curiae* is set forth in the motion for leave to file this brief *amicus*, to which motion this brief is attached.

STATUTES INVOLVED.

15 U. S. C., § 15 b, provides as follows:

> Any action to enforce any cause of action under sections 15 or 15a of this title **shall be forever barred unless commenced within four years** after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.[1]

Section 5 of the Clayton Act, as originally enacted in 1914, read in pertinent part as follows:

> A **final judgment or decree** hereafter rendered in any **criminal prosecution** or in any **suit or proceeding in equity brought by or on behalf of the United States** under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said **judgment or decree** would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent **judgments or decrees** entered before any testimony has been taken. . . .
>
> Whenever any **suit or proceeding in equity** or criminal prosecution is **instituted by the United States** to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof. .

[1] Emphasis has been added throughout this brief unless otherwise noted.

As amended in 1955, § 5 (15 U. S. C., § 16) reads as follows:

(a) A **final judgment or decree** heretofore or hereafter rendered **in any civil or criminal proceeding brought by or on behalf of the United States** under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent **judgments or decrees** entered before any testimony has been taken or to **judgments or decrees** entered in actions under section 15a of this title.

(b) Whenever **any civil or criminal proceeding** is **instituted by the United States** to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

SUMMARY OF ARGUMENT.

1. The direct issue in this case is a clear-cut question of statutory interpretation: Did Congress, in enacting § 5 of the Clayton Act, intend thereby to toll the statute of limitations for private antitrust actions during the pendency of Federal Trade Commission proceedings?[2] Section 5 was part of the original Clayton Act passed in 1914, and underwent a minor language revision in 1955. Thus, logical analysis divides the issue into two distinct questions: Did Congress, in 1914, intend § 5 to apply to FTC orders and proceedings? If not, did Congress, in 1955, intend to enlarge § 5 to make it applicable to FTC orders and proceedings?

The answers were clearly dictated by 49 years of settled law, which had been broken only by the district court decision in this case, and thereafter firmly reestablished by the United States Court of Appeals for the Eighth Circuit and three district courts. The court below, while failing to analyze these questions in detail, still effectively conceded that the answer to each of these questions is "No," and, for the first time, raised a question which no other court has ever dignified with recognition: Did Congress, in 1959, in making FTC orders final if review is not sought within a limited time, thereby intend to bring FTC proceedings within the scope of § 5 of the Clayton Act? Only by asking this novel question, and answering it in the affirmative, was the court below able to circumvent the established rule. Although the lower court rested its novel

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[2] We put to one side the recent decision of *Gottesman v. General Motors Corp.*, 221 F. Supp. 488, 493 (S. D. N. Y. 1963), holding that "There can be no claim for money damages for violation of section 7 [of the Clayton Act]." That holding was explicitly approved in *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F. 2d 725, 728 n. 3 (8th Cir. 1964). Since that issue was neither briefed nor decided in the courts below, and was not presented in the petition for a writ of certiorari, it is respectfully submitted that the issue is not presently before this Court.

decision entirely on the Finality Act of 1959, it is necessary to analyze the statutory language, the legislative history, and the pre-1959 authorities in order to demonstrate that Congress, in 1959, had no intent to effect such a drastic change in the settled law.

2. The central purpose of tolling the statute of limitations during the pendency of litigation brought by the United States is to permit a private treble-damage plaintiff to make use of a judgment or decree against the defendant. Section 5 (a), embodying language substantially similar to the language of § 5 (b), makes certain judgments or decrees admissible as *prima facie* evidence of the defendant's violation of law. If the government proceedings **cannot**, under any circumstances, result in an admissible judgment or decree, there is no reason to toll the statute. Because FTC proceedings result in an order which **cannot** constitute such a judgment or decree, therefore, Congress has not provided for tolling the statute during FTC proceedings.

An FTC order is not admissible under § 5 (a) because it fails to meet any of the three specific requirements of that statute. It is not a "final **judgment or decree**" rendered in a "**suit or proceeding in equity**" which has been "**brought by or on behalf of the United States.**". Had Congress desired to include FTC proceedings, Congress could easily have said so. But all of there requirements are clearly judicial in nature. The FTC is not a judicial tribunal, nor are its proceedings judicial proceedings, nor are they brought by or on behalf of the United States.

Even if the language of § 5 (a) did not clearly and unambiguously exclude FTC orders and proceedings, the legislative history would demonstrate that Congress did not intend FTC orders to be *prima facie* evidence.

All of the reported cases except the instant case have uniformly refused to admit FTC orders as "prima facie" evidence. The district court decision in this case has now

been considered and rejected by the United States Court of Appeals for the Eighth Circuit and three district courts. The only decision arguably to the contrary cited by the court below was specifically "**withdrawn**" on rehearing, and has since been further repudiated by the same court. All of the secondary authorities that research has disclosed have agreed that § 5 (a) does not apply to FTC orders.

The court below conceded that the 1955 amendment to the Clayton Act made no change in the requisites for admissibility. The only arguably relevant change in the language of § 5 was the substitution of the phrase "civil proceeding" for "suit or proceeding in equity." Legislative history clearly demonstrates that no substantive change was intended in 1955. Congress was well aware of the prior decisions excluding FTC orders from § 5 (a), and did not insert the term "agency proceedings," which is used in the Administrative Procedure Act and elsewhere for such proceedings. Congress merely changed the wording of § 5 to conform to Rule 2 of the Federal Rules of Civil Procedure, for there is no longer any such action in the federal courts as a "suit or proceeding in equity."

The 1959 Finality Act is totally irrelevant to the issue of admissibility. It does not affect § 5 in any way. Legislative history demonstrates that there was no intent to affect the scope of § 5. The only requisite of § 5 which it could possibly satisfy is that of finality, which is not an issue here. It does not affect the nature of the FTC nor of FTC proceedings. **Its sole purpose was to simplify enforcement of FTC orders by shifting the burden of seeking review from the FTC to the respondent.** An argument based on the 1959 Act was presented to the Eighth Circuit and two district courts, and not even considered worthy of comment by those courts. In any event, it has no possible relevance to the limitations issue.

Admission of FTC orders as *prima facie* evidence in treble-damage suits would require a fundamental re-evaluation of administrative procedures, for the specific rationale applied by this Court in allowing administrative agencies to rely on hearsay and other judicially incompetent evidence is that the effect of an FTC order is not to punish for past conduct, but to ban specific practices for the future.

3. Aside from the effect of § 5 (a) on the tolling statute (§ 5 (b)), if one considers § 5 (b) alone it is clear that the statute of limitations is not tolled by FTC proceedings. They do not meet the specific statutory requirements. An FTC proceeding is not a "suit or proceeding in equity." Furthermore, § 5 (b) requires a proceeding "instituted **by the United States.**" Even if an FTC proceeding could be said to be "brought **on behalf of the United States**" (the language of § 5 (a)), it is still not "instituted **by** the United States," for both this Court and Congress have always clearly distinguished between "the Commission" and "the United States," recognizing not only that they are separate parties ("the Commission" may sue and be sued in its own right) but that, at least for some purposes, they are not even in privity.

The history of the 1914 legislation demonstrates that Congress did not intend FTC proceedings to toll the statute of limitations. On the contrary, Congress, apparently acting from an abundance of caution, deliberately struck from the tolling provision the phrase "on behalf of" the United States, carefully limiting the tolling provision to actions "instituted **by** the United States."

The 1955 amendment did not enlarge the scope of § 5 (b), for FTC proceedings are not "civil proceedings," and Congress had no intent to change the existing law.

The Finality Act of 1959 is totally irrelevant to the limitations issue.

The court below attempted to find some of the requisites of § 5 in the appellate enforcement proceedings, rather than in the FTC proceedings. The effort was based principally on the fundamental misunderstanding of the court below that the enforcement proceedings are original, rather than appellate, in nature, and, in any event, the effort would lead to the absurd result of tolling the statute of limitations indefinitely.

The decision below is directly contrary to that of all the other courts which have considered the issue, and to the time-honored consensus of the antitrust bar.

4. If there are reasons why it would be desirable, today, to toll the statute of limitations for FTC proceedings, such reasons present a question for study and consideration by Congress, not for legislation by this Court.

ARGUMENT.

I. The Court Below Failed to Analyze the Real Issues.

The principal question presented in this case is whether the four-year statute of limitations for treble-damage actions under the antitrust laws is automatically tolled by the commencement of FTC proceedings. The tolling statute, § 5 (b) of the Clayton Act, was originally enacted in 1914, and amended in certain minor respects in 1955. The FTC was originally created in 1914, also, by the FTC Act, which has not subsequently been amended in any significant respect. Accordingly, the question presented must be analyzed as two separate questions:

1. Did Congress, in 1914, intend § 5 of the Clayton Act to apply to FTC orders and proceedings?

2. If not, did Congress, in 1955, in enacting a four-year statute of limitations, intend to enlarge § 5 to make it applicable to FTC orders and proceedings?

The court below failed to analyze these questions distinctly. Starting with the irrelevant Finality Act of 1959, which simply made FTC orders enforcing the Clayton Act final without judicial enforcement, the court ignored 45 years of settled law, and concluded that somehow the requirements of § 5 (b) of the Clayton Act are now met by an FTC proceeding. In so doing, the court lost sight of the language and purpose of § 5 of the Clayton Act, and indeed filed an opinion which is, itself, internally inconsistent.[3] Although the court below properly ruled (apparently) that the answers to the two questions above are negative, nevertheless, the reasons for those answers

[3] See page 102, *infra*. In addition, the court below relied principally on an opinion of the Second Circuit which had already been withdrawn by that circuit (see pages 29-33, *infra*), and secondarily upon a decision of the Seventh Circuit which had already been set aside by this Court (see pages 19-20, *infra*).

must be analyzed in detail here, so that the limited impact of the Finality Act of 1959 may be fully understood.

For 49 years, from the enactment of the Clayton Act (and the FTC Act) in 1914 until 1963, no court had ever held that Congress ever intended § 5 to apply to FTC orders and proceedings. Such a holding would not only have contradicted the express language and legislative history of both statutes, but would also be repugnant to the fundamental purpose of Congress in enacting: (1) the FTC Act; (2) the tolling provisions of § 5; and (3) the 1955 four-year statute of limitations for treble-damage actions.

II. FTC Proceedings Do Not Result in Admissible Judgments or Decrees, and Therefore Are Not Intended to Toll the Statute of Limitations.

The simple purpose of tolling the statute of limitations during the pendency of civil or criminal actions instituted by the United States was to permit a private treble-damage claimant to await the outcome of the government litigation so that he could take advantage of a "judgment or decree" adverse to the respondent, which would be admissible under § 5 (a) as "prima facie" evidence. Because FTC proceedings do not result in any admissible "judgment or decree," it would make no sense to toll the statute of limitations during such proceedings.

A. The FTC's Cease and Desist Order Is Not Admissible in a Treble-Damage Suit as "Prima Facie Evidence" under § 5 (a) of the Clayton Act, 15 U. S. C., § 16 (a).

1. The Decision Below Conflicts With the Express Congressional Purpose That an FTC Order Should Have Only Prospective Effect.

To rule that FTC orders were to become admissible as "prima facie" evidence, like a "judgment or decree" of a

court, would be repugnant to the expressed congressional desire that the regulatory powers of the FTC were to operate prospectively only. The novelty and uncertainty of the laws which the FTC was empowered to enforce, coupled with the then highly controversial status of non-judicial enforcement of the antitrust laws, and the relatively loose procedures permitted in administrative proceedings, led Congress to limit the FTC to restraint of future violations. Proposals to give the FTC power to punish or fasten liability upon respondents were emphatically rejected. See pp. 44-46, *infra*. Admission of an FTC order in a private judicial proceeding would thus give to such orders the very retrospective effect which Congress deliberately rejected.

Further, an FTC order is based to an unknown degree on hearsay and other incompetent evidence, admitted under non-judicial procedure in hearings where the prosecutor and judge are the same persons. Admission of such an order as *prima facie* evidence would be even more repugnant to judicial standards, and to the expressed desire of Congress, than would admission of such evidence itself, for, when the order alone is admitted, the jury would have no opportunity to devalue or ignore the judicially incompetent evidence. See **Wright v. Carter Products, Inc.**, 244 F. 2d 53, 59 n. 4 (2d Cir., 1953).

Congress accordingly had good reason to provide that a judgment or decree of a United States court should be admissible as "prima facie evidence," while withholding comparable effect from an FTC order. However, the court below has attempted to draw a distinction between FTC enforcement of the Clayton Act and FTC enforcement of the FTC Act. The point which the court below appears to have been making is that, while the FTC was intended to act only prospectively when enforcing the FTC Act, it does act retrospectively and inflict punishment when dealing with violations of §§ 2, 3, 7, and 8 of the Clayton

Act (See R. 74-78). It may be assumed that Congress could have drawn the distinction the Court below attempted to establish; the question is whether Congress actually did so. The debates abound with statements concerning the prospective nature of the FTC. Nowhere is there any hint that it should have a different function in enforcing the Clayton Act.

Not only do the cases cited by the court below fail to establish any such distinction; some of them firmly negate it. For example, **Standard Oil Co. v. FTC**, 282 Fed. 81, 86-87 (3d Cir., 1922), **aff'd**, 261 U. S. 463 (1923), is cited for the proposition that: "The Sherman Act was to serve as a guide for the Commission, as a 'declaration of policy', to be considered in determining what constituted an unfair method of competition" (R. 76). Actually, the FTC had charged Standard Oil with violation of both § 5 of the FTC Act and **§ 3 of the Clayton Act.** The court indicated no distinction in the functions of the commission in enforcing the two acts, and in fact, specifically stated that the above-quoted principle applied to cases under **both** Acts.

Moreover, the distinction does not advance the court's argument that § 5 applies to FTC orders and proceedings. The court concedes that Congress, in 1914, did not intend a "bare FTC order" to be admissible as *prima facie* evidence (R. 87). Yet, the FTC's functions in enforcing the FTC and Clayton Acts have undergone no substantial change since 1914. Thus, the court's "distinction" was just as persuasive, if at all, in 1914, when the court concedes that the FTC order was inadmissible.

Finally, the specific rationale which justifies admission of hearsay and other judicially incompetent evidence in FTC proceedings is that: "[T]he effect of the Commission's order is **not to punish or to fasten liability on respondents for past conduct,** but to ban specific practices for the future in accordance with the general mandate

of Congress." **FTC v. Cement Institute**, 333 U. S. 633, 706 (1948). Yet the court below has held that this principle does not apply to FTC enforcement of the Clayton Act! That holding must lead to one of only three possible conclusions: (1) The FTC can admit hearsay and other judicially incompetent evidence in hearings to enforce the FTC Act but not in hearings to enforce the Clayton Act; (2) This Court was wrong in the **Cement Institute** case; or (3) The Third Circuit is wrong. Number (3) certainly seems the most likely answer to the dilemma.

2. The Original Language of § 5 (a) Describes Only Judicial Proceedings, and Cannot Be Applied to Administrative Proceedings.

As originally enacted, the first paragraph of § 5 (now § 5 (a)) read:

> "A **final judgment or decree** hereafter rendered in any **criminal prosecution** or in any **suit or proceeding in equity brought by or on behalf of the United States** under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent **judgments or decrees** entered before any testimony has been taken. . . ." 15 U. S. C., § 16 (a).

Had Congress desired to include Federal Trade Commission proceedings within this section, Congress could easily have said so. But all relevant language in this section is judicial in tone. Federal Trade Commission proceedings are not judicial proceedings: "The Commis-

sion exercises only the administrative functions delegated to it by the act, not judicial powers. . . ." **FTC v. Eastman Kodak Co.**, 274 U. S. 619, 623 (1927). The FTC itself is not a judicial tribunal. **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972-73 (D. Maine 1963); **Proper v. John Bene & Sons**, 295 Fed. 729 (E. D. N. Y. 1923); **Wendel Shoes, Inc. v. Shoenterprise Corp.**, Trade Reg. Rep. (1958 Trade Cas.), ¶ 69132 (N. Y. Sup. Ct. 1958). Hence, the statute as a whole demonstrates that FTC proceedings are not within its ambit.

This proposition becomes doubly clear when the specific requirements of the section are analyzed. The court must:

> "determine that the decree complies with the requirements of section 5 before it may be admitted in evidence. There must be strict compliance for it is clear that no decree in any antecedent government anti-trust proceeding would be admissible in a private treble damage action, but for the provisions of section 5 of the Clayton Act." Timberlake, **The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws**, 36 N. Y. U. L. Rev. 991, 994 (1961).

a) An FTC Order Is Not a "Judgment or Decree."

Jurisdiction of certain Clayton Act violations is granted to the FTC (and the ICC, the FCC, the CAB, and the Federal Reserve Board), by § 11 of that act, 15 U. S. C., § 21. If the commission is "of the opinion" that one of these sections is being violated, it "shall issue and cause to be served on such person an **order** requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held . . ." etc. Time and again throughout this section (and § 5 of the FTC Act, 15 U. S. C., § 45) the term "order" appears. Nowhere is the commission authorized to issue a "judgment or decree." "The Federal Trade Commis-

sion does not render a 'judgment or decree'. Its authority is limited to that of issuing a cease and desist 'order' to curb violations of the antitrust laws." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963).

Nowhere in § 5 of the Clayton Act does the term "order" appear. These are terms of art, and Congress is well acquainted with their proper usage. For example, in § 5 of the FTC Act (enacted simultaneously, in 1914), the FTC is empowered to issue an "order" which is reviewable in the court of appeals. The court "shall have power to make and enter a **decree** affirming, modifying or setting **aside the order of the Commission**, . . ." Congress meticulously provided that "[n]o **order** of the Commission or **judgment** of court to enforce the same shall" absolve a **respondent of liability.** 15 U. S. C., § 45.

"Judgments" and "decrees" are traditionally issued by courts on the "law" side and "equity" side respectively. Federal Trade Commission orders "are administrative orders as distinguished from judicial decrees." **National Candy Co. v. FTC**, 104 F. 2d 999, 1004 (7th Cir.), **cert. denied**, 308 U. S. 610 (1939). In the Administrative Procedure Act, Congress carefully used the term "order," and defined it as "the final disposition . . . **of any agency** in any matter other than rule making . . . ." 5 U. S. C., § 1001 (d). "The FTC does not render a judgment or decree; its authority, as a quasi-judicial body, is limited to that of issuing cease and desist orders." Butler, **Application and Constitutionality of Tolling of Statute of Limitations Provisions of Section 5, Clayton Act, In Cases of Dual Enforcement Jurisdiction**, 8 A.B.A. Antitrust Section 42, 46-47 (1957). [Hereinafter cited as Butler.] **Accord**, Matteoni, **Antitrust Ambiguity Under Section 5 (a) of the Clayton Act**, 11 U. C. L. A. L. Rev. 792, 794-95 (1964). The FTC order fails to meet the first requirement.

The lower court did not even contend that the FTC order is a "judgment or decree," and, in fact, fairly clearly concedes that it is not. Rather, the court below held that, at least from 1914 to 1959, it was the decree of the court of appeals enforcing the FTC order which satisfied the statutory requirement:

> "While our 1914 legislators would not have accepted a bare FTC order of that period as admissible, the finality given such order through a decree emanating from the Court of Appeals would have resulted in its being considered a 'final judgment or decree,' within Section 5 (a)" (R. 87-88).

However, the judicially enforced order is still the order of the FTC, and not the "judgment or decree" of the court of appeals. See **Chain Institute v. FTC**, 246 F. 2d 231, 239 (8th Cir.), **cert. denied**, 355 U. S. 895 (1957); **American Chain & Cable Co. v. FTC**, 142 F. 2d 909 (4th Cir. 1944).. "Under Rule 3.27 of the Commission's Rules of Practice, an order is not regarded as the judgment or decree of a court after judicial affirmance; it continues to be the Commission's order, which the Commission can, at any time, 'reopen, alter, modify or set aside.'" Butler 50-51; see 16 C. F. R., §§ 3.27, 3.28 (b). The FTC has the power to proscribe the alleged violations of law, and the court of appeals has only a limited power to review the FTC proceedings. There are many other legal and logical objections to utilizing the appellate review to satisfy the requirements of § 5. These objections are discussed immediately *infra* in connection with the requirement for a "suit or proceeding in equity."

b) An FTC proceeding is neither a "Criminal Prosecution" nor a "Suit or Proceeding in Equity."

Obviously, an FTC proceeding is not a "criminal prosecution." It is equally obvious that it is not a "suit or

proceeding in equity."[4] **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725, 730-31 (8th Cir. 1964); **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972-73 (D. Maine 1963); Matteoni, **Antitrust Ambiguity Under Section 5 (a) of the Clayton Act**, 11 U. C. L. A. L. Rev. 792, 795 (1964). The Commission "has not been delegated the authority of a court of equity." **FTC v. Eastman Kodak Co.**, 274 U. S. 619, 623 (1927). This Court has quite recently recognized "Congress' evident refusal to confer upon the FTC the ordinary powers of a court of equity, . . ." **United States v. The Philadelphia National Bank**, 374 U. S. 321, 339 n. 17 (1963). For example, the FTC has no power to punish for contemptuous refusal to obey a subpoena, but must apply to a district court for enforcement of its processes. 15 U. S. C., § 49. Nor does it have power even to seek punishment of those who defy its orders, but must rely upon the Attorney General of the United States to bring a civil action for penalties. 15 U. S. C., § 21 (l). See **Proper v. John Bene & Sons**, 295 Fed. 729, 732 (E. D. N. Y. 1923); Beer, Federal Trade Law and Practice 429 n. 53 (1942); McDonald, **Proof of Conspiracy: The Prima Facie Rule**, 1952 CCH Antitrust Law Symposium 59, 62 [hereinafter cited as McDonald].

Congress, in choosing this language, was simply adapting § 5 to the provisions of the Sherman Act. Both §§ 4 and 9 of the Sherman Act (15 U. S. C., §§ 4, 9) provided that "[I]t shall be the duty of the several district [now "United States"] attorneys . . . to institute proceedings in equity to prevent and restrain such violations." Thus, "the phraseology of the Sherman Act makes indelibly clear the kind of suits that were meant." Butler 46. The FTC proceeding is not such a "suit."

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[4] *Cf. Columbia Gas & Electric Corp. v. American Fuel & Power Co.*, 322 U. S. 379, 383 (1944): "[A] bankruptcy proceeding is not itself a suit in equity either by statutory definition or in common understanding."

The opinion below concedes that, at least from 1914 to 1959, an FTC proceeding was not a "suit or proceeding in equity." However, the court stated that "[t]he 'proceeding in equity' therefore was not the Commission proceeding but the proceeding before the Court of Appeals from which a judgment or decree would issue determining and restraining a violation of the Act." R. 84. There are a number of barriers to this unique detour around 50 years of clear legislative history, judicial authority, secondary authority, and established practice.

Congress, in 1914, when it enacted § 5, was dealing only with "judgments and decrees" rendered in original proceedings, not appeals. For example, Congressman Floyd stated: "Such decree imports absolute verity, binding upon the Government and the party to the suit, both as to findings of fact and questions of law determined in the suit." 51 Cong. Rec. 9489 (1914). A court of appeals does not normally make "findings of fact," but accepts the findings below if they are supported by "substantial evidence", or rejects them if they are not. Moreover, appellate review is not normally deemed a separate "suit."

In reviewing FTC proceedings, the court of appeals does not hear the evidence and conduct a trial *de novo*. The court does not even weigh anew the evidence heard below. "The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive." 15 U. S. C., § 21 (c); **Timken Roller Bearing Co. v. FTC**, 299 F. 2d 839 (6th Cir.), **cert. denied**, 371 U. S. 861 (1962). Moreover, "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy." **Jacob Siegel Co. v. FTC**, 327 U. S. 608,

611-12 (1946). Indeed, in 1914, the congressional debates specifically recognized that the judicial review of FTC proceedings was intended to be appellate in nature: "In case he [the offending party] does not comply, the commission or board may bring suit in some circuit court for the enforcement of the notice. The party is treated just the same as if he had **appealed** from a judgment of a district court to the circuit court of appeals." 51 Cong. Rec. 16281 (1914) (remarks of Rep. Volstead).

The court below apparently realized that its unique circumvention of all previous authority is tenable only if the review of an FTC order is essentially an **original** rather than an **appellate** proceeding: "In formulating its **findings** and order, it [the FTC] presented itself in a manner analogous to a Master in Equity to the Court of Appeals . . . which sat not as an Appellate Court but as a court of equity enforcing, modifying or setting aside the orders of the FTC." R. 83-84. The first authority cited for this proposition is **C. E. Niehoff & Co. v. FTC**, 241 F. 2d 37, 42 (7th Cir. 1957). In that case, it is true that the Seventh Circuit held that its jurisdiction was "original" rather than "appellate," and withheld enforcement of the FTC order. However, the court below was apparently unaware that, in a *per curiam* opinion, this Court vacated and remanded the Seventh Circuit decision, directing that court to enforce the FTC order. 355 U. S. 411 (1958). The result is not surprising in light of this Court's specific holding in **FTC v. Eastman Kodak Co.**, 274 U. S. 619, 623-24 (1927):

> "[A] Circuit Court of Appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being **appellate** and **revisory**

merely, and not an exercise of **original** jurisdiction by the court itself."

In addition to the repudiated **Niehoff** case, the court below cited three earlier authorities in attempting to establish that the court of appeals' jurisdiction in enforcing FTC orders is original rather than appellate: **FTC v. Fairyfoot Prods. Co.**, 94 F. 2d 844 (7th Cir. 1938); **Butterick Co. v. FTC**, 4 F. 2d 910 (2d Cir. 1925); and **L. B. Silver Co. v. FTC**, 292 Fed. 752, 753 (6th Cir. 1923). The latter two cases, it is true, contain dicta supporting this proposition. Both were specifically cited to this Court by the respondent in the **Niehoff** case and, of necessity, were rejected by the *per curiam* opinion therein.

Further, those cases were cited in a footnote to **FTC v. Ruberoid Co.**, 343 U. S. 470, 479 n. 19 (1952), where this Court pointed out a fundamental objection to the novel suggestion of the court below that the court of appeals' judgment or decree was admissible under § 5 (a): "There is no reason why one who has complied with the order, but who seeks to have it reviewed and modified or set aside, should be placed in a worse position than one who does not exercise that right." 343 U. S. at 479-80.

Thus, if the judicial review were to subject defendant to the danger that the resulting judgment could be used against him in a subsequent treble damage action, there would in effect be a penalty upon the exercise of the right of review. Such a result would be unfair, if not unconstitutional, and no such intention should be imputed to Congress. See Seeley, **The Pitfalls Which Lurk in Government Litigation for Defendants Who May Be Subjected to Treble Damage Actions**, 4 Antitrust Bull. 17, 20 (1959).

Further, legislative history demonstrates clearly, not only that Congress did not intend to include FTC orders and proceedings in the scope of § 5, but that there was

not the slightest intention that appellate review of FTC orders and proceedings would be included. The repeated references to "trials" and "jury trials" and to suits instituted by the "Attorney General" are not answered by the lower court's ingenuity; nor is the repeated complaint by opponents of the bill that, after all was said and done, the respondent would "preserve his swag," having suffered no loss from the FTC proceedings. See pp. 44-46 *infra*.

Finally, the court below applied this innovation in the antitrust laws **only** to the question of the admissibility of the FTC order. Nowhere does the court state when, under this new interpretation, the statute of limitations would be tolled. As is demonstrated at pp. 92-93 *infra*, this innovation cannot be applied to the tolling provision in any way that will make sense.

c) **An FTC proceeding is not "brought by or on behalf of the United States."**

At a superficial glance, an FTC investigation might be considered to have been brought "by or on behalf of the United States." However, an action brought "by the United States" is normally considered to be an action brought by the Attorney General. An agency which can sue or be sued in its own right is not "the United States," nor is it acting "on behalf of" the United States. See the authorities cited at pp. 85-92 *infra* relating to § 5 (b).

The court in **Proper v. John Bene & Sons**, 295 Fed. 729, 732 (E. D. N. Y. 1923), though not specifically ruling on this point, indicated considerable doubt whether an FTC proceeding is "brought by or on behalf of the United States." See **Beer, Federal Trade Law and Practice** 429 n. 53 (1942); McDonald 62.

Finally, repeated references in the congressional debates on this section to suits by the "Attorney General"

(see discussion of legislative history at pp. 41-43 *infra*), coupled with the absence of any reference in the discussion of this section to suits brought by the FTC, demonstrate legislative intent to limit § 5 to Justice Department suits or prosecutions. Accordingly, the FTC order fails to meet the third requirement.

It is notable that, even if the FTC proceedings could be regarded as being "brought on behalf of the United States," the same could not be said for the appellate review proceedings on which the court below relied. Review would frequently (and, since 1959, invariably) be sought by the respondent, not by the FTC.

A possible explanation for the phrase "on behalf of" in § 5 (a) may be found in an amendment to the bill which was offered and rejected. This amendment would have authorized the attorney general of any state to institute a criminal proceeding, in the name of the United States, to enforce the anti-trust laws. 51 Cong. Rec. 14519, 14527 (1914); see **Georgia v. Evans**, 316 U. S. 159, 162 n. 1 (1942). It may be that some Congressmen would have thought that a judgment in such a case should be admissible as prima facie evidence in a treble-damage suit. At the same time, it is easy to see why Congress would be reluctant to permit the statute of limitations to be tolled at the whim of any state attorney general, and carefully limited the proceedings which would toll the statute to those "instituted by the United States."

3) **The Reported Cases Have Uniformly Refused to Admit FTC Orders as "Prima Facie Evidence," and the Antitrust Bar Has Agreed That Such Orders Are Not Admissible.**

Although § 5 has been on the statute books for 50 years, research has disclosed not a single case in which an FTC order has been admitted in evidence under § 5. In fact, until the district court decision in this case, no court had

ever in any way applied § 5 to FTC orders and proceedings. That unprecedented ruling has been emphatically rejected by three other district courts and the Eighth Circuit Court of Appeals:

In Highland Supply Corp. v. Reynolds Metals Co., 327 F. 2d 725 (8th Cir. 1964), all of the acts originally complained of occurred from six to seven years prior to the filing of the complaint, and the defendant moved to dismiss under the four-year statute of limitations, 15 U. S. C., § 15b. Plaintiff alleged that an intervening FTC proceeding, which was appealed to the court of appeals by defendant, tolled the statute under 15 U. S. C., § 16. Defendant also moved to strike all references to the FTC order and proceedings, while plaintiff claimed that the order would be admissible as *prima facie* evidence. The district court carefully considered and rejected the 3M district court opinion and unequivocally held that § 5 had no applicability to FTC orders or proceedings:

> "[I]n our view 'civil or criminal proceeding' plainly means a judicial proceeding and not an administrative proceeding. . . . Congress by its language has permitted the tolling of the statute only for a civil or criminal proceeding instituted by the United States. . . . We, therefore, hold that the statute of limitations has not been tolled. . . . [W]e conclude that neither the FTC order nor the Court of Appeals affirmance would be admissible in this private treble damage action." 221 F. Supp. 15, 17-18 (E. D. Mo. 1963).

The Eighth Circuit, although remanding the case to allow the plaintiff an opportunity to amend, nevertheless agreed completely with the district court that § 5 does not apply to FTC orders and proceedings:

> "In the light of controlling authority, we can find no ambiguity in the terms 'civil or criminal proceed-

> ings' as used in that section of the Clayton Act. . . . Since Section 5 of the Clayton Act has 'no application to an order . . . of the Federal Trade Commission' . . . we hold that any reference made to the F.T.C. proceedings in the instant complaint was insufficient to toll the statute of limitation as provided in that Act, . . ." 327 F. 2d at 730-31.

The United States District Court for Maine has written a comprehensive, scholarly analysis of the entire question, concluding that § 5 has no applicability to FTC orders or proceedings:

> "The precise question for decision is whether, by the use of the phrase 'any civil or criminal proceeding * * * instituted by the United States to prevent, restrain, or punish violations of * * * the antitrust laws' in Section 5 (b) of the Clayton Act, Congress intended to include a proceeding initiated by the Federal Trade Commission. In the view of this Court, the language used by Congress, taken in its ordinary and natural sense, argues against such a conclusion, and a consideration of the policy intended to be served by the statute, its legislative history, and other usual aids to statutory construction all support the view that Congress did not use the words in the sense for which plaintiff contends." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 970 (D. Maine 1963).

It is respectfully submitted that by all standards of logical and legal analysis, and by all canons of statutory construction, the Maine opinion is a superior and more persuasive study of the issues in this case than the opinion of the court below.

The fourth federal court to reject the novel **3M** decision was the United States District Court for the Eastern Dis-

trict of Tennessee in **Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.**, 223 F. Supp. 712, 713 (E. D. Tenn. 1963):

> "Judge Augelli clearly assimulates [sic] a proceeding by the Federal Trade Commission to one 'instituted by the United States.' In the judgment of this Court, Judge Augelli's opinion is doubtful authority for this view, because of its reliance upon the case of Brunswick-Balke-Collender Co. v. American Bowling and Billiard Corp., 150 F. 2d 69 (C. A. 2)."

The court below criticized all four federal courts which disagreed with it:

> "[T]hose courts clearly **overlooked the affirmative statutory distinction** between FTC proceedings under the FTC Act and under the Clayton Act and that distinction's vital effect upon Section 4 and Section 5 of the Clayton Act; otherwise they could not have **reasonably** adopted the **obsolete Proper rule.** To do so at this stage is to consider the present question in a vacuum and simply forget all about the present governing statutory formula for the enforcement of the Clayton Act and the increased powers that have come to the FTC." R. 91.

This is basically two criticisms in one. These courts are charged with having "clearly overlooked the affirmative statutory distinction between FTC proceedings under the FTC Act and under the Clayton Act." This "distinction," which appears to have originated with the appellate opinion in this case, has been discussed earlier. If such a "distinction" exists, and if it has any relevance to this case (see pp. 11-13, *supra*), it existed in 1914 just as much as it does today. Yet the court below concedes that, in 1914, an FTC proceeding was not a "suit or proceeding in equity" and an FTC order was not admissible in evidence. The court failed to point to anything

since 1914 which altered or enlarged this "distinction." Thus, if as the court below concedes, its illusory, "distinction" did not make § 5 applicable to FTC proceedings in 1914, it is difficult to see how it could have any greater effect today.

The second criticism relates to the "obsolete Proper rule" and "forget[ting] all about . . . the increased powers that have come to the FTC." The reference to the "obsolete Proper rule" is to the classic case of **Proper v. John Bene & Sons**, 295 Fed. 729 (E. D. N. Y. 1923), where the court said:

> "An analysis of section 5 . . . discloses that there are six requirements contained in said section 5 with which compliance must be had in order to make the proceedings competent evidence in this suit: (1) The judgment or decree must be final. (2) It must have been rendered in a criminal prosecution or in a suit or proceeding in equity. (3) The prosecution, suit, or proceeding must have been brought by or on behalf of the United States. (4) It must have been instituted under the anti-trust laws. (5) It must be to the effect that a defendant has violated those laws. (6) It shall be prima facie evidence against that defendant.
>
> "Considering these in the order set forth, the court is constrained to hold: (1) That the proceedings before the Federal Trade Commission did not result in a final judgment or decree. (2) There is grave doubt whether the proceedings before the Commission is a proceeding in equity. The Commission itself is rather an investigating body than a judicial tribunal, and its order has no binding effect until it has received the judicial sanction of the Circuit Court of Appeals. (3) Strictly speaking, it would seem that the proceeding is not brought by or on behalf of the United States, inas-

much as it is instituted by the Federal Trade Commission, although it may well be held that this body as a creature of the government may be said to be acting on behalf thereof. (4) The suit or proceeding must be brought under the anti-trust laws. Neither the Federal Trade Commission Act in its references to anti-trust acts, nor the Clayton Act in its references to anti-trust laws, includes the Federal Trade Commission Act in such a classification. Therefore the proceeding before the Federal Trade Commission is not such a proceeding as is held by section 5 of the Federal Trade Commission Act to be competent evidence, as asserted by plaintiff. (5) The discussion of the fourth requirement is applicable to the fifth. (6) The Act permits the proceedings before the Commission to be received as prima facie evidence against such defendant. In the case at bar there are various other defendants." 295 Fed. at 731-32.

Of the **Proper** case, the court below said:

"There are no findings in Proper contrary to our conception of the law as it stood in 1923. The court in Proper dealt with a 1923 FTC proceeding under the FTC Act. We have before us a proceeding under the Clayton Act brought by an expanded 1960 FTC." R. 85.

Thus, the court below agrees that, at least until 1959, an FTC proceeding was not a "suit or proceeding in equity," and bases its decision entirely on "an expanded 1960 FTC."

It is unfair to charge the various federal courts with simply "adopt[ing]" an "obsolete" rule. In the first place, it is abundantly clear from a reading of at least three of the opinions (Eighth Circuit, Missouri, and Maine), particularly that of **Farmington Dowel**, that those

courts engaged in a detailed analysis of the precise statutory language, and reached their own independent conclusions as to the scope of § 5. Secondly, the lower court's only disagreement with **Proper** is based on the 1959 Finality Act. The court below referred to the "increased powers that have come to the FTC" (R. 91) and to "an expanded 1960 FTC" (R. 85). As will be seen at pp. 64-68, *infra*, Congress, in 1959, had absolutely no intention of bringing FTC orders or proceedings within the scope of § 5 of the Clayton Act. Certainly, the Finality Act did not result in any "increased powers" for, nor expansion of, the FTC. Further, contrary to the lower court's apparent understanding, the question of the effect of the 1959 "Finality Act" **was** presented to the courts in the **Highland Supply** and **Farmington Dowel** cases, and the argument was apparently considered too frivolous to justify comment in the opinions. At the very least, it is unwarranted to say that these courts could not "reasonably" have differed with the lower court's construction of the effect of the 1959 Act upon the scope of § 5.

The lower court totally ignored all other authorities. For example, in **United States v. United Shoe Mach. Corp.**, 89 F. Supp. 349, 356 (D. Mass. 1950), Judge Wyzanski, "an eminent authority on the antitrust laws,"[5] ruled:

> "The Commission's cease and desist order may in many cases be as drastic as the decree of a District Court, except for the one point that the District Court's decree unlike the Commission's order can be used as prima facie evidence in a private treble damage suit."

Judge Wyzanski regarded the matter as too plain to require the citation of authority.

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[5] *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 223 F. Supp. 967, 971 (D. Maine 1963).

See also **International Tag & Salesbook Co. v. American Salesbook Co.**, 6 F. R. D. 45, 48 (S. D. N. Y. 1943) ("Assuming that a proceeding before the Federal Trade Commission comes within the purview of this section [Section 5 (a)], **which I doubt**, . . ."); **Wendel Shoes, Inc. v. Shoenterprise Corp.**, Trade Reg. Rep. (1958 Trade Cas.), ¶ 69132 (N. Y. Sup. Ct. 1958).

As recognized by the court in the **Farmington Dowel** case: "The commentators, apparently without exception, concur with Judge Wyzanski's conclusion." 223 F. Supp. at 974. These authorities presumably represent the consensus of the antitrust bar:

"Note also that an order or finding of an administrative agency such as the Federal Trade Commission cannot be used as evidence in a private suit for treble damages." Kronstein & Miller, Regulation of Trade 1106 (1953). "This section [5] has no application to an order or decree of the Federal Trade Commission." 2 Toulmin, Anti-Trust Laws 118 (1949). "[A]djudications in Federal Trade Commission proceedings are not prima facie evidence in private antitrust suits under Section 5 (a) of the Clayton Act; . . ." 1961 CCH Trade Reg. Rep., ¶ 9157. The *prima facie* evidence clause of § 5 "has no application to an order or decree of the Federal Trade Commission." Thornton, Combinations in Restraint of Trade 908 n. 2 (1928). Accord: I Hoffmann, Antitrust Law and Techniques 23, 23 n. 34 (1963); Beer, Federal Trade Law and Practice 429, 429 n. 53 (1942); Butler 45-47; McDonald 62; Kintner, **The Trade Court Proposal: An Examination of Some Possible Defects**, 44 A. B. A. J. 441, 444 n. 29 (1958); Matteoni, **Antitrust Ambiguity Under Section 5 (a) of the Clayton Act**, 11 U. C. L. A. L. Rev. 792, 795 (1964).

The only case cited by the court below as raising a contrary inference was flatly repudiated by the same court on rehearing. In **Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.**, 150 F. 2d 69, 74 (2d

Cir.), **cert. denied**, 326 U. S. 757 (1945), a majority of the court initially decided that:

> "Before the Act was amended in 1938, a cease and desist order of the Federal Trade Commission did not become operative except after the entry of an enforcing decree by the Court of Appeals; the Commission's order could not then be regarded as a 'judgment' or 'decree' within the meaning of § 5. But now that, pursuant to the 1938 amendment, a Commission order becomes final, unless judicial review is sought within a permitted period, such an order, if not reviewed, must be considered a 'judgment' or 'decree' within § 5. Here no review was sought." 150 F. 2d at 72.

Notably, the majority failed to mention the other requirements of § 5, namely, that such "judgment" or "decree" be rendered in a "suit or proceeding in equity" which has been "brought by or on behalf of the United States." On rehearing, the majority reversed itself and excluded the decree, explaining:

> "In our [first] opinion, we treated the 1938 amendment as to the effectiveness of the Commission's orders as an amendment of the Clayton Act, . . . In fact, it merely amended the Federal Trade Commission Act. . . . We must, therefore, hold that the order of the Federal Trade Commission was correctly excluded. Cf. Proper v. John Bene & Sons, . . ." 150 F. 2d at 74.

In a footnote, the court announced: "That portion of our previous opinion as to violations of the Clayton Act is accordingly **withdrawn**." 150 F. 2d at 74 n. 1. Thus, the Second Circuit squarely rejected its earlier opinion.

Nevertheless, the court below relied exclusively on this **withdrawn** opinion for authority directly in point, stating:

> "There the Court held [!] that an FTC proceeding was a 'final judgment or decree' rendered in a 'suit or proceeding in equity brought by or on behalf of the United States' . . ." (R. 85).

The original dissenting opinion of Judge Evans might now be considered in the nature of a concurring opinion, since the majority eventually reached the same result. Because it represents the leading appellate pronouncement on the admissibility of an FTC order, assuming *arguendo* that the order is a "final" order, it is worthy of examination:

> "I believe the District Court properly excluded the order of the Federal Trade Commission. It does not fall within that portion of Section 5 of the Clayton Act quoted in the majority opinion. It seems to me the order of the Commission, final though it may be, is not the kind of an order described by Section 5. It is not a 'final judgment or decree rendered in any criminal prosecution.' Neither is it a 'final judgment . . . in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws.' Proper v. John Bene & Sons, D. C., 295 F. 729; Federal Trade Law and Practice, Henry Ward Beer, page 429, footnote 53.
>
> "As stated by Mr. Beer, 'Under the Wheeler-Lea Amendments to the F. T. C. Act, Commission orders may become final. . . . However the present finality of such orders would not have affected the decision in the Bene case because of the other criteria mentioned by the court.'
>
> "Aside from these authorities it seems tolerably plain to me that the quoted portion of Section 5 of the Clayton Act does not apply to an order of the Federal Trade Commission." 150 F. 2d at 73.

Of this opinion it has been said: "The viewpoint of Judge Evans seems beyond challenge." Butler 45.

It is quite true, as the lower court has charged, that the other four federal courts have "summarily rejected the [original] Brunswick-Balke-Collender opinion" (R. 90-91). However, it is neither true nor fair to say that all of these courts did so because "the status of the Brunswick-Balke opinion of Judge Frank was fundamentally misunderstood" (R. 91). Quite the contrary, the court in **Farmington Dowel** understood quite thoroughly that Judge Frank's opinion "was not reversed." In fact, the **Farmington Dowel** court recognized, as the court below apparently did not, that Judge Frank's opinion not only was "not usable," but was "subsequently **withdrawn.**" **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 974 (D. Maine 1963).

The decision below is probably the only court of appeals' decision in history in which the only opinion which the court relied on as being directly in point had been explicitly "**withdrawn.**" 150 F. 2d at 74 n.1.

Further, the court below failed even to mention Judge Evans' dissent to the original opinion, and was apparently unaware that the Second Circuit has subsequently accepted Judge Evans' opinion as a correct statement of the law. In **Wright v. Carter Prods., Inc.**, 244 F. 2d 53 (2d Cir. 1957), a tort action for damages allegedly caused by defendant's deodorant, plaintiffs "attempted unsuccessfully to introduce findings of the Federal Trade Commission, affirmed by a court of appeals prior to Mrs. Wright's purchase in 1951, to the effect that the use of Arrid will cause dermatitis in some people." 244 F. 2d at 56. The court rejected this proof because of its non-judicial nature, citing with approval both the **Proper** case and the **Brunswick** opinion **on rehearing**:

> "Since this finding was made in a controversy between different parties and at **an administrative hearing conducted according to its own rules of evidence**, it is admissible in the suit at bar only on the

issue of notice and not as evidence of the fact of Arrid's propensities. Cf. Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp., 2 Cir., 1949, 150 F. 2d 69, 74; Proper v. John Bene & Sons, D. C. N. Y. 1923, 295 F. 729, 731-32." 244 F. 2d at 59 n. 4.

The spot citation to **Brunswick** is to the **second Brunswick** opinion. Since the **Carter Products** order had been affirmed by a court of appeals, the Second Circuit could not have been citing either the second **Brunswick** opinion, or **Proper**, on the question of finality. Thus, the Second Circuit has squarely repudiated the original, withdrawn opinion in **Brunswick**; has reaffirmed the authority of **Proper**; and has held that both cases stand for the proposition that "an administrative hearing conducted according to its own rules of evidence" cannot result in an order which has any proper place in judicial proceedings.

4. Legislative History Demonstrates That Congress in 1914 Did Not Intend FTC Orders to Be Used as "Prima Facie Evidence" in Treble-Damage Suits.

It is axiomatic that, where the words of a statute are unambiguous, it is unnecessary to resort to legislative history to determine the meaning of the statute. Conversely, if the language is ambiguous, it is proper to utilize legislative history as an aid to construction.

The following courts have specifically ruled that the language of § 5 clearly and unambiguously **excludes** FTC proceedings and orders. The Eighth Circuit (**Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725 (8th Cir. 1964)); the Eastern District of Missouri (**Highland Supply Corp. v. Reynolds Metals Co.**, 221 F. Supp. 15 (E. D. Mo. 1963)); the Eastern District of Tennessee (**Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.**, 223 F. Supp. 712 (E. D. Tenn. 1963)); see **United States v. United**

Shoe Mach. Corp., 89 F. Supp. 349, 356 (D. Mass. 1950); **Proper v. John Bene & Sons**, 295 Fed. 729 (E. D. N. Y. 1923); see also **International Tag & Salesbook Co. v. American Salesbook Co.**, 6 F. R. D. 45, 48 (S. D. N. Y. 1943); **Wendel Shoes, Inc. v. Shoenterprise Corp.**, TRADE REG. REP. (1958 Trade Cas.) ¶ 69132 (N. Y. Sup. Ct. 1958). The District Court of Maine apparently agreed that the language unambiguously excluded FTC proceedings, but went further and supported its conclusion with legislative history (**Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 970 (D. Maine 1963) ("In the view of this Court, the language used by Congress, taken in its ordinary and natural sense, argues against [inclusion of FTC proceedings] . . . .")).

The district court in this case rejected the unanimous rulings of the federal courts in holding that the language of § 5 did not clearly **exclude** FTC proceedings, but was compelled to acknowledge that § 5 did not unambiguously **include** FTC proceedings, and thus turned to legislative history to interpret the language. However, no relevant legislative history was cited to the district court.

The opinion of the court below is unclear on this point. Legislative history is referred to a number of times. Apparently, the court felt that the present language is ambiguous, for the court turned to legislative history. However, the court also appears to have held that the **original** language clearly and unambiguously **excluded** FTC proceedings.

In sum, no court has ever held that either the original or the present language of § 5 clearly **included** FTC orders or proceedings. Further, every court which has considered the original language of § 5 has held that it clearly **excluded** FTC orders and proceedings. Finally, every court (except the lower courts in this case) which have answered

the question have held that the **present** language clearly **excludes** FTC orders and proceedings.

Extensive 1914 legislative history was presented to the Eighth Circuit to demonstrate that Congress had no intent to include FTC orders and proceedings within the scope of § 5. Since the court below clearly has agreed on this point, only a small portion of this history will be briefed herein. However, voluminous evidence of the original congressional intent has been deposited with the Clerk of this Court, marked Appendices A through E and I through K.

Both the FTC Act and the Clayton Act were considered in the same session of Congress, in 1914, and numerous cross-references appear throughout the debates. In the extensive debates of the Clayton Act concerning both § 5 (a) (denominated Section 6 in the draft under debate) and the FTC Act, "there is **not a single suggestion** that Section 5 might be applicable in the case of a Federal Trade Commission proceeding." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963). The debates emphatically negate any possibility that the absence of such a suggestion was a mere oversight.

> "The **overwhelming impression** one forms after reading the legislative history of the original Clayton Act is that none of the members of Congress in 1914 contemplated that Federal Trade Commission proceedings were within the purview of Section 5. . . . [T]he fact that the relevant legislative history is replete with references to judicial proceedings, and contains no mention of Commission proceedings, is a persuasive indication that there was **no intention** that the latter should generate Section 5 benefits." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963).

The floor debates on the FTC Act itself dispose of any suggestion that Congress wanted the results of Commission proceedings to be any kind of evidence, much less *prima facie* evidence:

> "Mr. Sutherland: . . . . So far as the findings of the commission are concerned, I do not think they ought to be evidence anywhere.
>
> "Mr. Crawford: I do not either.
>
> "Mr. Sutherland: I doubt very much whether we could make them evidence. . . . ." 51 **Cong. Rec.** 12789-90 (1914).

While the committee reports on the Clayton Act (Appendices I, J and K) are devoid of relevant material except for general reiterations of the language of the statute, the debates on the floor of each house contain abundant material affirmatively demonstrating the congressional understanding that § 5 (then 6) was not to apply to FTC proceedings.

1. Many statements made on the floor incontrovertibly demonstrate that all the Congressmen understood that a "final judgment or decree . . . in a suit or proceeding in equity" did not include an FTC order. For example, the spokesman for the Judiciary Committee, which had reported the bill, and the leader of the fight for its passage was Senator Walsh, who also led the unsuccessful fight to give the decree **conclusive** rather than *prima facie* effect. In arguing that his proposal would not violate the Constitution, he emphasized that § 5 did not apply to administrative orders, but only to judgments or decrees of the courts:

> "I want to say just a word with reference to the authorities to which the attention of the Senate has been invited . . . Nobody questions them. They all lay down the rule that in an action brought against

an individual who has never theretofore **had his day in court** you can not make a certificate or a recital or an **order of an administrative board** or anything of that kind conclusive against him. You may make it prima facie evidence.

". . . [T]he principle is general that whenever the law requires a certain document to be filed containing certain recitals that document becomes prima facie evidence of the truth of the recitals therein, and you can not make it conclusive. **That is quite a different thing. Here the party has had its day in court.** He has tried every issue, and it is simply a question, now that he has had it tried, whether he may insist upon a **second trial.**" 51 **Cong. Rec.** 13856-57 (1914).

(All quotations of debate herein are from volume 51; hereafter, they will be referred to by page number only.) See also Senator Walsh's argument at 13851, quoted more fully in Appendix A: The defendant "has had an opportunity to try out before a **court**, with all the **forms of the law**, every question involved in the lawsuit." Could there be a clearer statement that § 5 did not apply to administrative proceedings, or one from a more authoritative source? The senator's entire argument was bottomed on the very fact that administrative orders would not be admissible in a treble-damage suit.

On the other side of the fence, there were those who thought a judgment or decree for a defendant should be equally binding on a treble-damage plaintiff. In opposing this idea (originally in the House bill), Senator White argued:

"Then Mr. President, as has been said, it is burdensome enough to require parties to the litigation themselves to be bound by the **findings of a court or jury** in a particular case. So many things that we can not at the time possibly foresee influence such

decisions. The way in which the evidence is produced may have its effect upon a **jury or a court.**

"The manner in which the case is handled by the lawyers employed may determine in the mind of a **jury or a court** what the verdict or the judgment shall be, and yet, Mr. President, those things should probably not have been controlling influences in the conclusions reached." 13900.

2. In addition to the above specific statements: "Excerpts from the committee reports and Congressional debates are distinctly judicial in tone." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963). Only a few exemplary statements are included here, but many others will be found in Appendix A to this brief, and in the following pages of this brief.

When the final conference bill was returned to the House for approval, Representative Floyd, the co-author of the bill, who led the fight in the House for its passage, told the House:

"Under section 5 of the bill any private litigant injured by the unlawful acts of any corporation where the Government of the United States has proceeded against such corporation and obtained a judgment, either in a **court of law or equity**, is allowed the use of that judgment or decree to show the unlawful acts of the combination to the full extent that it would be an estoppel between the Government and the original offender. That is a new remedy never given to litigants before. . . . That is a new remedy and a most efficient remedy. The Government of the United States, acting in behalf of all of its citizens, prosecutes a trust, convicts it either **in a criminal court or a civil court**, and the private litigant, injured by the unlawful acts of such trusts, has nothing to do in order to recover the three-fold damages ex-

> cept to prove the amount of damages and that the injury was done by this trust or corporation. It shifts the burden of proof and gives the litigant a great advantage." 16319.

Again, Sen. Cummins said: "But when the suit is brought, then the **judgment** or **decree** of the **court** in the suit that has been brought by the Government would be prima facie evidence of violation of the antitrust law, . . ." 13850.

Lest it be thought that the term "court" was intended to embrace the FTC, note the following by Sen. Reed: "The fact is, as everyone knows, that the Trade Commission could not deal with criminal penalties because **it is not a court.**" 16154.

Another colloquy, this time in the House, is particularly significant:

> "Mr. McKenzie: If this section is left in the bill do you not feel and believe that this decree that is mentioned in this section should be the decree of the court of last resort—the Supreme Court of the land?
>
> "Mr. Volstead: No.
>
> ". . .
>
> "Mr. McKenzie: You think it would be good policy to leave a matter of such great importnace in the hands of an **inferior court**?
>
> "Mr. Volstead: Yes. . . ." 9079.

The term "inferior court" is a particular term of art found in Article III of the United States Constitution and is limited to Article III courts. See, *e. g.*, Ex parte **Bakelite Corp.**, 279 U. S. 438 (1929). Certainly, the FTC is not an Article III court.

The illustrations are legion. The overall impact of the debates on the reader is that this Congress had not the slightest intention of applying § 5 to administrative pro-

ceedings, and that these senators and representatives were quite confident that they had written § 5 in such a way as to limit it to strictly judicial proceedings. Many of these men were lawyers with years of experience. They were dealing with terms of art carefully and conscientiously. It should not lightly be said that they abused their tools.

> "Congress is, after all, not a body of laymen unfamiliar with the common places of our law. . . . [T]he Congress is predominately a lawyers' body. We attribute 'to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction . . . .'"

between judicial and non-judicial proceedings. **Callanan v. United States**, 364 U. S. 587, 594 (1961).

3. As previously noted, the House bill made a "final judgment or decree" in a "suit or proceeding in equity" **conclusive** evidence against a treble-damage defendant. Many representatives argued that this provision would deny the constitutional right of trial by jury. Both the challenges to and the defenses of this provision repeatedly emphasized that the admissible decree would be a decree of a traditional **court of equity**:

> "Mr. Scott: Mr. Chairman, I ask the gentleman whether in the case of a suit brought at law against a corporation for damages under the antitrust law, as it exists today, such defendant corporation would have the constitutional right to demand a jury trial in the law action?
>
> "Mr. Volstead: Certainly, it would.
>
> "Mr. Scott: Then how can we, by legislation, make a **decree in equity** conclusive evidence against that corporation?
>
> "Mr. Volstead: I do not think we can.
>
> "Mr. Scott: Does not the gentleman's amendment seek to do that very thing?

"Mr. Volstead: I do not think so. My amendment seeks to avoid making a judgment conclusive against a **private party**.

"Mr. Scott: But as against a corporation. Having tried the case before a **court in equity**, it is deprived of the right to jury trial in the law action for damages which the Constitution guarantees. The gentleman has substituted a **court of equity** for the constitutional jury." 9488.

(Further quotations on this point appear in Appendix B.)

Nowhere is it even suggested that defendants would be bound by an FTC order. How much louder the cries of the opponents of "conclusiveness" would have been had it even been suspected that five commissioners might be substituted for twelve jurors, and that the loose procedures of an administrative tribunal might be substituted for judicial procedures.

4. As originally presented to the House, § 5 (then 6) also made a "judgment or decree" rendered in a "suit or proceeding in equity brought by or on behalf of the United States" conclusive against any prospective treble-damage plaintiff. Opponents of this reciprocity clause vigorously challenged the constitutionality of binding a party who has never had his "day in court." Time and again, the debates made it clear that the proceeding contemplated was an action brought for the United States by the **Attorney General**, not an administrative proceeding. On the practical side, the measure's opponents raised the specter of a collusive suit resulting in an absolution of a trust which would bind the world:

"Mr. Sisson: . . . [D]oes the gentleman believe that his rights in the court should be determined upon the questions raised by the **Attorney General of the United States**?

"Mr. Prouty: Why, certainly not; the Constitution expressly prohibits it. In other words, the **Attorney General** could go in and prevent my having a trial before a jury.

"Mr. Sisson: That is the point I had in mind.

"Mr. Prouty: By instituting a proceeding in equity and having the case tried.

"Mr. Sisson: That is the point I had in mind, that the **Attorney General**, if he was disposed to do so—we would not charge that of any particular **Attorney General**—might cook up a case which would directly defeat the rights of every individual if he had been injured." 9492.

Defenders of the proposition countered:

"Mr. Cullop: My question is this: Supposing a collusive suit was brought and the defendant won on the issue, then is every outsider barred from any further suit? According to this language he is.

"Mr. Floyd of Arkansas . . .

". . . My answer to that proposition is that if the time ever comes in this Government when any **Attorney General** will enter into collusive suits with corporations and combinations engaged in unlawful acts, it will be an evil day for our Republic, a day when every statute will become useless and justice will become a mockery." 9489-90.

(Additional excerpts from the debates are set forth in Appendix C).

Throughout the debates there is no hint that an absent party might be bound by the FTC (or, for that matter, the Interstate Commerce Commission or the Federal Reserve Board—see 15 U. S. C., § 21). Those who feared that the trusts might "get to" the Attorney General of the United States would surely have been far more exercised if it had been proposed that collusive actions by the new agency could foreclose private litigants.

In fact, several senators already feared that the commission would become the tool of trusts and monopolies:

> "What are those who are violating the law getting under this change of program? . . . Fourth, they secure a commission whose membership merely they have to control in order to control the situation." 14262 (remarks of Sen. Reed.) (Further excerpts appear in Appendix C.)

Is it conceivable that great lawyers such as these, fearful for the independence of the Trade Commission the Senate had just agreed to create, would have kept silent upon a provision giving the commissioners power to estop forever all treble-damage plaintiffs from suing a particular trust or monopoly? How much more vociferous the protests against reciprocal conclusiveness would have been had it been contemplated that § 5 apply to the FTC.

5. Furthermore, an amendment was in fact offered in the Senate which would—arguably—have resulted in bringing administrative proceedings within the scope of the phrase "suit or proceeding." The amendment met with opposition and was withdrawn under fire.

The House bill dealt only with a "suit or proceeding in equity," and did not apply to criminal proceedings. After the bill reached the Senate, Sen. Bryan moved to strike out the words "in equity," so the provision would read simply "any suit or proceeding." As observed by Sen. Reed, "That would cover any kind of proceeding." Sen. Culberson proposed a substitute adding the phrase "criminal prosecution or," and retaining the phrase "in equity." Significantly, Sen. Bryan withdrew his broader proposal and accepted Sen. Culberson's limited substitute. 13897-98. (The debate on this amendment is set out in Appendix D.)

6. The debates over the "lack of teeth" in FTC proceedings emphasize that there was no purpose to admit the results of such proceedings in treble-damage suits.

The House originally passed the Clayton Act with four substantive sections, each having a criminal penalty attached. All of the criminal penalties were removed in the Senate or in conference. Sen. Reed of Missouri, leading the opposition to the bill, charged repeatedly that the Clayton Act had been stripped of all force and effectiveness:

> "We end by providing a smooth and easy road which may be traveled through the years, until finally a commission shall issue an innocuous nonenforceable decree, a decree that can be vitalized only by being affirmed by a court. At the conclusion of all the litigation we propose to impose no penalty, levy no fine, send no one to jail, and **we permit the culprit to preserve his swag!**" 15867.

Had it been available, the obvious answer would have been that the bill does have teeth, and the culprit will not be allowed to preserve his swag, for the Commission's order will be admissible *prima facie* evidence against him, and private claimants will be able to reclaim this swag three times over. Neither this, nor any other answer challenging the accuracy of Sen. Reed's statement, was heard on the Senate floor, although his complaint was echoed repeatedly in the debates. (Excerpts of the same import are set forth in Appendix E.) Significantly, this complaint was voiced emphatically by Sen. Borah, who charged that the act told monopolists to "Keep the ill-gotten gains that you have made, . . ." 16044. (Cited fully in Appendix E.) Elsewhere in the debates, Sen. Borah made it clear that he keenly desired any provision which would ease the problems of the private treble-damage plaintiff (15950—see Appendix E), and further

that he considered private suits "the most effectual means of enforcing the Sherman antitrust law, . . ." (16046—see Appendix E). Clearly, Sen. Borah understood that the Clayton Act would not give treble-damage claimants the benefit of FTC orders.

In the House, Rep. Nelson charged:

> "Finally, the penalty is cut out; they can do all these things, and the Trade Commission can only say 'You must not do it any more.' Then there is the long delay in an appeal to the courts; and they go through the courts, and then what? There may be an injunction issued, but **they have got away with the loot with impunity.**" 16325.

(Numerous statements of like import are collected in Appendix E.) In rebuttal, Rep. Webb, Committee spokesman, pointed out various "teeth" in the bill, including §§ 5 and 11 (giving the FTC jurisdiction over violations of §§ 2, 3, 7, and 8), saying:

> "Now, the value of these two sections is this: That they not only give the individual the right to sue for treble damages where he pleases, and we not only suspend the statute of limitations if a **Government** suit is brought against a trust, but we **also** require the **Federal Trade Commission** to stop these practices and take those guilty of such practices into court.
>
> "But that is not all. Some argue that after the Trade Commission takes jurisdiction that excludes individuals from pursuing these other remedies. The bill further provides:
>
> "'No **order of the commission** or board **or** the **judgment of the court to enforce the same** shall in any wise relieve or absolve any person from any liability under the antitrust acts.'

"So you have three or four distinct remedies, all of which may be invoked at the same time." 16274.

Three things are noteworthy. First, Rep. Webb specifically distinguishes "Government" suits (used interchangeably with "United States" throughout the debates) from "Federal Trade Commission" action. Second, Rep. Webb specifically distinguishes between the "order" of the administrative agency and the "judgment" of a court; he and his colleagues fully understood the common meaning of these terms when they used them in § 5. Third, in reply to those who feared that assumption of jurisdiction by the FTC would exclude treble-damage actions, a specific rebuttal would have been that § 5 tolled the statute during FTC proceedings and made FTC orders *prima facie* evidence. Rep. Webb could not give this answer, for such was not the case.

In summary, it was clearly not the intent of Congress that § 5 apply to FTC orders. Any other conclusion would impugn the legal abilities of the members of Congress in 1914. As Thomas F. Butler, Jr., has said:

> "It seems inconceivable . . . that in 1914, when the Commission was established and when this expression was used in the enactment of the Clayton Act, any member of the Congress equated the administrative functions to be performed by the FTC with judicial proceedings. At that time, careful distinctions were preserved in federal courts between their jurisdiction in law actions and suits in equity, and it stands to reason that the expression 'suit or proceeding in equity' was used solely to distinguish between court actions, on the law or equity side of the court docket." Butler 46.

However, as noted previously, the court below attempted to circumvent the settled law of 49 years by suggesting

that, where the FTC sought enforcement, or the defendant sought review, in the court of appeals, the judgment of the court of appeals enforcing the FTC order was admissible even though the FTC order itself was not. The many logical, legal, and historical objections to this novel theory have already been set forth at pp. 16, 18-21, *supra*. Further analysis will show that the lower court's notion fares no better than the FTC order itself when faced with the gauntlet of the foregoing legislative history.

First, in the debates on the FTC Act itself, it was stated and repeated without contradiction that "the findings of the commission" ought not "to be evidence anywhere." 12789-90 (see p. 36, *supra*). The court of appeals makes no findings, and must accept those of the Commission if supported by "substantial evidence." 15 U. S. C. § 21 (c) (see p. 18, *supra*). Thus, whether or not the FTC order has been reviewed by the court of appeals, the findings are still "the findings of the commission" and ought not "to be evidence anywhere." Whether enforced or not, an order is still "an order of an administrative board," [13856-57; See **Chain Institute v. FTC**, 246 F. 2d 231, 239 (8th Cir.), **cert. denied**, 355 U. S. 895 (1957)—see pp. 16, 36-37, *supra*], which "is quite a different thing" from a "judgment or decree" within the meaning of § 5. 13856-57. It is certainly not "the findings of a court or jury." 13900—see p. 37, *supra*. Even where the order has been reviewed, the respondent has not "had an opportunity to try out before a court, with all the forms of the law, every question involved in the lawsuit." 13851—see p. 37, *supra*.

Second, in the debates on whether a "judgment or decree" in a "suit or proceeding in equity" should be conclusive evidence against a treble-damage defendant, it was repeatedly emphasized that the government suit would be a trial in a court of equity, not merely a review: "Having tried the case before a court in equity, it is de-

prived of the right to jury trial in the law action for damages which the Constitution guarantees. The gentleman has substituted a **court of equity** for the constitutional jury." 9488. It is quite clear that Congress contemplated only a suit **originating** in a court of equity: "the corporation is **brought into a court of equity** upon a **proper bill** and by a **proper service**, and with subject matter over which the court has jurisdiction, . . ." 9492. (Remarks of Rep. Scott.)

Third, in the debates on the constitutionality of making a "judgment or decree" conclusive against a treble-damage plaintiff, the fear was repeatedly expressed that an **Attorney General** might compromise away the rights of a treble-damage plaintiff: "[T]he **Attorney General**, if he was disposed to do so—we would not charge that of any particular **Attorney General**—might cook up a case which would directly defeat the rights of every individual if he had been injured." 9492. "Although the independents have never had their day in court, they are absolutely bound by any feeble compromise the **Attorney General** may make." 9169—see pp. 41-43, *supra*. Regardless of whether proceedings in the court of appeals were instituted as review proceedings by the defendant, or as enforcement proceedings by the FTC, they are obviously **not** brought by the **Attorney General**.

Finally, the debates over the lack of teeth in the Clayton Act demonstrate the inapplicability of § 5 to appellate proceedings just as well as they demonstrate its inapplicability to the FTC proceedings themselves. Opponents of the tooth-pulling charged repeatedly that the Clayton Act had been stripped of all force and effectiveness: "[W]e permit the culprit to preserve his swag." (15867); "[T]hey have got away with the loot with impunity" (16325). Had it been available, the simple, effective answer to these gibes would have been that FTC

orders would be *prima facie* evidence in treble-damage proceedings. This answer was not given, for the simple reason that it was not available. An almost equally effective answer would have been that a judgment of a court of appeals enforcing an FTC order would be admissible as *prima facie* evidence. This answer was not given either, and for the same, obvious reason—it simply was not true. Similarly, opponents of the final bill feared that assumption of jurisdiction by the FTC would exclude treble-damage actions. Again, a clear, simple answer would have been that, by the provisions of § 5, judicially enforced orders were admissible in treble-damage actions. This answer was not given. It could not have been. See 16274—see pp. 44-46, *supra*.

In sum, the court below has conceded that, under § 5 as originally passed, FTC orders were clearly excluded. Its attempt to circumvent this inevitable conclusion finds no support in the language of the statute, in case law, or in legislative history, and is plainly and simply illogical.

5. **The 1955 Amendment to the Clayton Act Made No Change in the Requisites for Admissibility.**

The only time that § 5 has been amended in any way since its passage was in 1955. The court below makes no claim that this amendment had any relevance to the case at bar, and, in fact, tacitly concedes that there has been no substantive change in § 5 since its inception (R. 81, 84-85). However, in order that this Court may fully understand the source of the present language of § 5, the following pages will briefly explain that language. More detailed coverage of the legislative history of the 1955 amendment is set forth in Appendices G, H, and L through S.

a) The term "Civil Proceeding" does not include FTC proceedings.

The only change in § 5 which could possibly have any bearing on the admissibility of an FTC order is the substitution of the phrase "civil or criminal proceeding" for the phrase "criminal prosecution or suit or proceeding in equity." The other prerequisites for admissibility—that it be a "judgment or decree" rendered in a proceeding "brought by or on behalf of the United States"—remain unchanged. As previously shown, an FTC order fails to meet these requirements. An FTC order is still not a "judgment or decree." An FTC proceeding is still not "brought by or on behalf of the United States." The fact that Congress failed to change these other requisites was conclusive proof to the court in **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963), that Congress intended no substantive change:

> "It also seems significant that Congress used the phrase 'judgment or decree' in the original Clayton Act, and that this language was left unchanged by the 1955 amendment. The Federal Trade Commission does not render a 'judgment or decree.' Its authority is limited to that of issuing a cease and desist 'order' to curb violations of the antitrust laws. . . . It seems reasonable to assume that if Congress had intended by the substitution of the words 'civil or criminal proceeding' in the 1955 amendment of the Clayton Act to include a Federal Trade Commission proceeding, it would have amended the phrase 'judgment or decree' to include an administrative 'order'."

However, even if these remaining prerequisites were satisfied, an FTC hearing is not a "civil or criminal proceeding."

Congress has specifically denoted hearings and investigations conducted by administrative bodies as "agency

proceeding[s]" in laying down the fundamental guideline for all such bodies—the Administrative Procedure Act. 5 U. S. C., § 1001(g). "[T]hat is their proper classification." Butler 46.

Further, Congress has used the term "civil proceedings" in other statutes where to interpret the term as including agency proceedings would lead to absurd results. For example, does 28 U. S. C., § 1337, in conferring on district courts "original jurisdiction of any civil action or proceeding arising under" the antitrust laws, thereby confer original jurisdiction of complaints filed by the FTC under § 11 of the Clayton Act? Apparently, Congress has never used the term "civil proceeding" to apply to an agency proceeding. Strong evidence should be required before it is found that Congress here departed from basic terminology it has itself laid down.

That an FTC proceeding is not a "civil proceeding" was quite clear to the court in **Highland Supply Corp. v. Reynolds Metals Co.**, 221 F. Supp. 15, 17 (E. D. Mo. 1963):

> "[I]n our view 'civil or criminal proceeding' plainly means a judicial proceeding and not an administrative proceeding. Such is clear to us because the words 'civil or criminal' used to describe the proceeding further identifies and affirms the general understanding of 'proceeding' to mean the method of conducting business before a court."

Similarly, in **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972 (D. Maine 1963), the court found "no indication in the relevant legislative history that Congress intended any substantive change by the substitution of these words, . . ."

The court in **Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.**, 223 F. Supp. 712, 713 (E. D. Tenn. 1963), reached an identical conclusion: "[T]here is nothing in the

amended language which clearly broadens the Act to include proceedings by the Commission." **Accord, Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725, 730-31 (8th Cir. 1964). No court has ever held to the contrary.

b) **Legislative history clearly demonstrates that the 1955 legislation was not intended to effect any change in § 5 (a).**

The actual legislative history of the 1955 amendment goes back to 1949. Hearings were held by a Senate subcommittee in 1949, by a House subcommittee in 1950, and again by the House subcommittee in 1951. Reports were issued by the House subcommittee in 1950 and in 1955, and by the Senate Subcommittee in 1955. Debate was held on the floor of the House in 1950 and again in 1955. The bill which was finally passed remained the same basic bill throughout, although it carried different numbers and was redrafted by different authors. Some of its provisions varied, but the provision in question was the same throughout.

(i) Specific statements demonstrate that § 5 was unchanged except in certain specified particulars not relevant here.

First, Rep. Patman appeared before the House subcommittee in 1951 because he feared that some amendment had been made to § 5 which would remove the right of a private litigant to use a judgment obtained by the Government. Rep. Wilson assured him: "This doesn't change the present law." Rep. Keating, the author of the bill, then commented: "I think there is a slight change in existing law where it refers to the subsequent numbers. There has to be a change in phraseology in that because of what we have done in section 4. I believe that is the only change." **Hearings on H.R. 3408 Before the Sub-**

committee on Study of Monopoly Power of the House Committee on the Judiciary, 82d Cong., 1st Sess., Part 3, 98-100. [Hereinafter cited as 1951 House Hearings.] (Relevant portions of this colloquy are set out in Appendix F.)

Second, on the floor of the House, Rep. Quigley stated:

> "It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131 (1955).

Numerous analyses were presented to the committee in the course of the hearings, and these uniformly stated that no significant or substantive change was being made in the "prima facie evidence" provision. See *e. g.*, Statements of the Committee on Trade Regulation and Trademarks of the Association of the Bar of the City of New York in 1950 and 1951, and of Abram F. Myers, an attorney, quoted in part in Appendix F.

(ii) None of the numerous statements setting forth the purposes of the various bills included a purpose to amend § 5 to include FTC orders.

Time and again the committees, the individual members thereof, individual congressmen, the FTC, the Justice Department, and interested private parties set out specifically and numerically the objectives to be accomplished by the bill in its various versions. Not once was there the slightest suggestion of an intention to change the scope of § 5 to include administrative orders.

The most significant documents are the committee reports on the bills. H. R. Rep. No. 422, 84th Cong., 1st Sess. (1955), sets forth in detail every change which the bill

would achieve, but nowhere is there any suggestion of any change in the "prima facie evidence" provisions of § 5.

S. Rep. No. 619, 84th Cong., 1st Sess. (1955), lists as the bill's "Purpose":

> "The purpose of the proposed legislation is to amend the Clayton Act (38 Stat. 730) by (a) granting the United States the right to recover actual damages for injuries to its business or property by reason of violations of the antitrust laws, and (b), by establishing a uniform 4-year statute of limitations for antitrust damage suits brought by private parties or the United States." *Id.* at 1.

The only reference in this Report to amendment of the "prima facie evidence" clause of the Clayton Act is:

> "Section 2 of the bill amends section 5 (a) of the Clayton Act to provide that final judgments or decrees rendered in civil or criminal proceedings (with the exception of Government damage suits under the new section 4A) instituted by the United States under the antitrust laws shall be prima facie evidence against defendants in damage suits by the United States under proposed section 4A as well as in private damage suits." *Id.* at 2.

In other words, the only change was to give the United States the benefit of the section in its newly created single-damage remedy.

S. Rep. No. 619 also sets forth for the Senate a letter from the Attorney General, who stated the amendments sought as he saw them, and also mentioned no substantive change in the "prima facie evidence" clause. *Id.* at 7. Senator Johnston of Texas stated the purpose of the bill to the Senate by repeating the language of the committee report. 101 **Cong. Rec.** 9165 (1955).

If these committees of the Congress in fact intended to make any such drastic change in the settled law, unchal-

lenged in 41 years of administration, as bringing administrative orders within the ambit of the "prima facie evidence" clause of the Clayton Act, they were deliberately setting out to perpetrate a fraud upon their fellow Congressmen by concealing this purpose from them. Even upon the most unequivocal evidence, one supposes that this Court would hesitate to impute such a purpose to these committees.

The Senate debates and the House debates, insofar as here relevant, are quoted in full in Appendix R. Time and again in these debates, the purposes of the bill were set forth, and never was any such change as this suggested.

Thus, if the committee or any Congressman had any purpose to change the prerequisites for the application of the *prima facie* evidence provisions, such purpose was never disclosed to the Senate or House of Representatives.

The foregoing constitute all of the known legislative materials directly dealing with H. R. 4954, the 1955 amendment to the Clayton Act. One portion of the history of prior proposals is worthy of note here. In the hearings on these proposals, representatives of the FTC testified before the committees, and their testimony is highly significant.

In the 1949 Senate hearings, James W. Cassedy, Associate General Counsel of the FTC, testified: "Of course, the Federal Trade Commission is interested only in certain sections of the Clayton Act. We are interested in sections 2, 3, 7 and 8, I believe." Senator Donnell inquired, "Is any one of those sections affected by this bill?" Mr. Cassedy replied "No." **Hearing on S. 1910 Before a Subcommittee of the Senate Committee on the Judiciary,** 81st Cong., 1st Sess. 15 (1949). (Hereinafter cited as 1949 Senate Hearings.) (See App. L.)

In the 1950 House Hearings, a Report of the Federal Trade Commission per Lowell B. Mason, acting chairman,

was presented to the committ[illegible] This report explicitly stated the Chairman's understanding that only a criminal or injunction proceeding could give rise to the "prima facie effect":

> "The objectives of the legislation proposed by H. R. 7905 are (1) to permit the Government itself, as a private party, to sue for actual damages which it has suffered by virtue of violations of the antitrust laws; (2) to establish a Federal statute of limitations for all suits for triple and actual damages under the antitrust laws; and (3) to make a judgment or decree in favor of the United States in a criminal or injunction proceeding again [*sic*] a defendant for violation of the antitrust laws conclusive evidence against such defendant in a suit for triple damages by a private litigant."

The Report then repeats the language of the tolling provision without comment. Finally, it notes that:

> "Other provisions of the bill would accomplish its third objective by making a judgment or decree in favor of the Government in a criminal or injunction proceeding for violation of the antitrust laws, conclusive evidence (instead of prima facie evidence as provided in the present law) in a suit by a private litigant for triple damages based upon such violations."

Hearings on H.R. 7905 Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, 81st Cong., 2d Sess. 66-67. (1950). (Hereinafter cited as 1950 House Hearings.) (See App. M.) See also a 1951 letter from Jas. M. Mead, Chairman, Federal Trade Commission, failing to indicate any such change, reproduced, in pertinent part, in Appendix F.

If any body or agency should have been aware of and interested in a proposal to make FTC orders "prima facie" evidence in treble-damage suits, it would be the

FTC. Yet, in three separate hearings, the FTC's official statement is totally devoid of any hint that such was either the purpose or effect of the language in question, or that such would be a desirable change.

Appendix F contains the relevant material from the earlier legislative history, including a committee "staff analysis" of an earlier version (the Denton bill) which Rep. Michener told the House "covers every phase of this bill." 96 **Cong. Rec.** 10442 (1950). This material clearly demonstrates that Congress had no intent or desire to change the prerequisites of admissibility in § 5.

(iii) Language used in the committee hearings indicates that the committee was considering § 5 in the context of judicial proceedings.

During the testimony of Professor Milton Handler of Columbia University, the following colloquy took place:

> "Mr. Wilson: Professor, I haven't read the legislative history, but as a general rule when these kinds of matters are involved, for absolute fairness wouldn't you ordinarily say that it would be better to have a rebuttable presumption, especially where **different courts and different juries** are involved, than to have a conclusive presumption, where no rebuttal testimony could be offered to offset or to change that **verdict?** Many times we disagree with the **verdict of a jury.** . . .
>
> . "That is our system. **Juries** disagree, as politicians disagree and as preachers disagree. Generally speaking, then, it is better to have a rebuttable presumption, because one might go haywire. . . ."

1950 House Hearings 11. Later, Rep. Michener stated that: "I don't like that 'conclusive' provision because you are frequently before different forums, dealing with **different juries,** in different localities." 1950 House Hearings 13. It would not seem that Reps. Wilson and Michener were speaking of FTC hearings. See App. M.

(iv) Arguments concerning the proposal to make a judgment or decree under §5 conclusive demonstrate that there was no intent to amend §5 to include FTC proceedings.

The bill considered in the 1950 House Hearings would have amended §5 to make judgments or decrees thereunder conclusive on treble-damage defendants. The statement of Rep. Wilson quoted in subsection (iii), *supra*, and of other representatives quoted in Appendix F, were made in opposition to this change. If these gentlemen were concerned because a jury might "go haywire," surely they would have expressed their feelings even more vehemently if there had been no jury at all, but merely a non-judicial (or "quasi-judicial") investigation before an administrative agency. The relation of this problem to the right of trial by jury was again called to the attention of the committee in the form of a Report by the Committee on the Clayton Act of the Section on Antitrust Law of the New York State Bar Association, on the Denton Bill:

> "It is submitted that giving a judgment in one action conclusive effect in another action, brought by a total stranger, is a practice not to be encouraged even upon the showing—not present here—of imperative necessity. It seems particularly inadvisable to permit any **judgment in an equity proceeding to deny the right of trial by jury** on the principal issue of a subsequent action at law." 1951 House Hearings 24. (See App. N.)

(v) During the 1950 House hearings (p. 46), Rep. Patman advocated that a judgment or decree be made binding on plaintiff, as well as defendants. In protesting this proposal, an expert witness, Walter Hamilton, made it clear that only judicial proceedings were contemplated:

> "I personally would not like to see the law written that if in a Government suit the defendants are found

innocent, that, therefore, binds me in a private suit. I have a great deal of respect for the people in the **Department of Justice**, but I think any one of them will tell me that there are degrees of ability in the **Department of Justice** and some people do better with a case than others." 1950 House Hearings 60. (See App. M.)

Significantly, no congressman or witness suggested any danger concerning the competency and honesty of FTC investigators, lawyers, hearing examiners, or the commissioners themselves.

(vi) The House committee was specifically informed that § 5 did not apply to FTC orders, and knowingly refrained from making or advocating such a change. During the 1951 House Hearings, the "chairman of the American Bar Association's standing committee on commerce" wrote the following letter to Congressman Celler:

"Dear Congressman Celler: . . .

"(1) I note that you have changed the language of section 5 of the Clayton Act, which now reads: 'A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States' to read: 'A final judgment or decree hereafter rendered in any civil or criminal proceeding * * * brought by or on behalf of the United States.' There is no objection to this change, **unless** by reason thereof it **could be contended** that a final order of the Federal Trade Commission or of a circuit court of appeals affirming a Trade Commission order is a judgment or decree rendered in a civil proceeding brought by or on behalf of the United States. **The courts have uniformly held in construing the present section 5 that a Federal Trade Commission proceeding was not within the purview of the act. Obviously, it should**

not be, since the Commission is not a court and proceedings before the Commission are not equivalent to a hearing in court. It would be most unfortunate, it seems to me, to open up this question by changing the language which has already been definitely construed. A Federal Trade Commission action is not a suit or proceeding in equity. There may be some doubt, of course, whether a Federal Trade Commission proceeding can be said to have been brought by or on behalf of the United States. I respectfully suggest, however, that the committee should not inject an element of uncertainty as to the type of proceeding encompassed by section 5 and should either revert to the language of the original section or insert in the third line after (b)—an administrative proceeding or proceeding brought to review or modify an administrative order. . . .

Edward R. Johnston, Chairman."

1951 House Hearings 21-22. (See App. N.)

Apparently, the suggestion that the proposed language might introduce "an element of uncertainty" caught both the committee and its witnesses off their guard. For instance, when this suggestion was called to the attention of H. Graham Morison, Assistant Attorney General in Charge of the Antitrust Division, Department of Justice, he replied, "that is a point that is new to me," and declined to comment until he could study it. 1951 House Hearings 15-16. If Mr. Morison did later ponder the question, there is no record of it.

This suggestion was discussed by Mr. Kenneth C. Royall:

"Mr. Royall: . . .

"Now, gentlemen, there was one matter, one question, that was raised as to something about the FTC, by Mr. Shears. I think a careful reading of that comment will show that the suggestion of the American

Bar Association was to clarify the fact that FTC operations were not to be covered.

"Mr. Shears: That's correct.

"Mr. Royall: They were not to be covered in this statute, and I am sure that is a sound recommendation.

"Mr. Shears: What is your feeling with regard to the present language?

"Mr. Royall: I do not think they should be covered by this statute, because they are not of a judicial, strictly judicial, nature.

"Mr. Shears: Do you feel that the present language, without the suggested amendment of the American Bar Association, excludes the Federal Trade Commission or not?

"Mr. Royall: It never occurred to me that it included it. I must be frank; but, if there is any question about it, I think it ought to be excluded. However, we do not affirmatively suggest that, and we just ask that the committee give whatever consideration to the meaning of the language they think proper." 1951 House Hearings 58.

In summary, the chairman of an ABA committee expressed a fear that the proposed change in language might create uncertainty where none had existed before. The committee's questioning of witnesses Morison and Royall demonstrates that the Congressmen had never considered such an interpretation. Are we to suppose that, once such a possible uncertainty was called to their attention by one who opposed it, they formed a purpose to make a change in the law, and relied on the "uncertain" language to achieve the change? It would be more than disrespectful to presume that, having formed such an extraordinary purpose, these gentlemen set out to conceal that purpose from their colleagues in Congress, and withheld any reference thereto from the committee reports. The only reasonable conclusion available is that

the committee followed the recommendation of Mr. Royall and decided that the language of the bill was not ambiguous, in view of the fact that it had not disturbed any of the witnesses who appeared.

This incident has another significance which demonstrates conclusively that no change was intended. Mr. Johnston told the committee:

> "The courts have uniformly held in construing the present section 5 that a Federal Trade Commission proceeding was not within the purview of the act. Obviously, it should not be, since the Commission is not a court and proceedings before the Commission are not equivalent to a hearing in court." 1951 House Hearings 21.

Thus, if the committee was not already aware of the **Proper** case [**Proper v. John Bene & Sons**, 295 Fed. 729 (E. D. N. Y. 1923)], and of Judge Wyzanski's statement in **United States v. United Shoe Machinery Corp.**, 89 F. Supp. 349, 356 (D. Mass. 1950), this letter certainly called their attention to the existing state of the law. The leaders of the antitrust bar agreed that FTC orders were not admissible under § 5 (a). See secondary authorities cited at p. 29, *supra*.

> "The Congress may be presumed to have been conscious of the opinions in the two decisions mentioned above questioning the application of that phrase to FTC proceedings; and also to have known of the statement of Judge Wyzanski, a recognized authority on antitrust matters, . . ." Butler 47.

Nevertheless, the Senate and House Reports, and the debates in the House and Senate, are all completely devoid of any suggestion that any change in this established rule was intended. On the contrary, Congressman Celler, to whom the ABA letter was addressed, assured the House twice that this was "a relatively simple bill" [101 **Cong.**

Rec. 5129, 5130 (1955)], and then outlined its provisions, without any mention of a substantive change in the scope of § 5. Under the circumstances, it would be grossly unfair to Congressman Celler and his committee to impute to them a purpose to alter a 41-year-old proviso without calling it to the attention of their colleagues. Quite the contrary, the 1955 amendment seems to fall squarely within the line of authority holding that where Congress, with knowledge of extant judicial authority, reenacts a statute in substantially the same language, "without any change indicative of a disapproval of the prior construction . . . [such] reenactment operates as an implied legislative approval of the prior construction . . . ." **Johnson v. Manhattan Ry.**, 289 U. S. 479, 500 (1933). See also, *e. g.*, **NLRB v. Gullett Gin Co.**, 340 U. S. 361, 366 (1951). If Congress had desired to include FTC proceedings Congress could easily have said so. "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted . . ." **Maynard v. Elliott**, 283 U. S. 273, 277 (1931). To paraphrase the court in **Seaboard Air Line R. R. v. United States**, 83 F. Supp. 1012, 1015 (Ct. Cl. 1949), "it is to be presumed that Congress knew of the decision[s]" holding that § 5 did not apply to the FTC, and, "[i]f it did, its failure to state explicitly" that § 5 would apply to FTC orders and proceedings "is an indication that it did not intend it to so apply."

c) Congress Changed the Wording of § 5 to Conform to the Federal Rules of Civil Procedure.

If substitution of the phrase "civil or criminal proceeding" for "criminal prosecution or suit or proceeding in equity" was not intended to be a substantive change, why was it made? The answer is disarmingly simple—there is no longer any such action in the federal courts as a "suit or proceeding in equity." The Federal Rules of Civil Procedure, promulgated by this Court in 1938, abolished the distinction between law and equity. Rule 2

states: "There shall be one form of action to be known as 'civil action.'" **Fed. R. Civ. P.** 2. Since § 5 was being amended anyway, it was simply good draftsmanship to alter its language to conform to this change in federal procedure.

> "The reasonable conclusion is that the term 'civil or criminal proceeding' reflects merely the adoption of the phraseology of the present Federal Rules of Civil Procedure, in which the separate concept of a proceeding in equity under former Federal Equity Rules no longer exists: 'There shall be one form of action to be known as "civil action"' (Rule 2) and of the present Federal Rules of Criminal Procedure, which speak of 'criminal proceedings' (Rule 1)." **Butler** 46.

The District Court of Maine was thoroughly convinced of this explanation:

> "[T]he reasonable conclusion is that Congress merely changed the language to conform to that of the Federal Rules of Civil Procedure, which abolished the procedural distinctions between actions at law and suits or proceedings in equity, and the Federal Rules of Criminal Procedure, which speak of 'criminal proceedings.'" **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972 (D. Maine 1963).

6. The Finality Act of 1959 is totally irrelevant.

In the final analysis, the court below based its reversal of 49 years of settled law solely on an amendment to § 11 of the Clayton Act in 1959. Prior to that amendment, an FTC order under the Clayton Act did not become "final," and no longer subject to review, until either the commission sought enforcement or the respondent sought review in the court of appeals. Until the court of appeals had

ruled on such an application, the order was always subject to review. There was no time limit on either such application. The amendment to § 11 changed this procedure by making FTC Clayton Act orders "final" and enforceable **unless** the respondent sought review within a limited time. The amendment is totally irrelevant to the case at bar.

a) The only thing accomplished by the 1959 Finality Act is to make FTC orders automatically "final," thereby shifting the burden of seeking review from the FTC to the respondent. The only requirement of § 5 to which this change could conceivably relate is the requirement in § 5 (a) that the "judgment or decree" be final. Finality, of course, is in no way at issue here.

However, the court below asserts that somehow this amendment to § 11 of the Clayton Act "expanded" the FTC (R. 85), gave it "increased powers" (R. 91), and transformed the agency proceeding into "a 'proceeding in equity' and a 'civil proceeding' within the meaning of Section 5, . . ." (R. 85).

The Court below did not explain how or why this metamorphosis took place. The problem which Congress was seeking to remedy was that "the former § 11 procedures [for enforcement] were too cumbersome to assure effective enforcement of agency orders." **FTC v. Henry Broch & Co.**, 368 U. S. 360, 365 n. 6 (1962). The 1959 act had absolutely no effect on the nature of the FTC or its proceedings. This Court has specifically held that the FTC "has not been delegated the authority of a court of equity" **(FTC v. Eastman Kodak Co.**, 274 U. S. 619, 623 (1927)), and the lower court's blunt pronouncement to the contrary is embarrassingly barren of any authority.

Further, Congress, under the 1939 Wheeler-Lea Act, had long before made FTC orders under § 5 of the FTC act

"final" unless review was sought within a certain time. If the 1959 amendment to § 11 somehow transformed the FTC into a "court of equity" when examining Clayton Act violations, then the 1938 Wheeler-Lea Act must have similarly transformed the FTC into a "court of equity" when enforcing the FTC Act. This presents the phenomenon that, from 1938 to 1959, the FTC sat as a "court of equity" when enforcing the FTC Act and as an administrative agency when enforcing the Clayton Act.

In short, the Finality Act had no effect on any of the requirements of § 5 (a) in issue here, and is totally irrelevant to the issue of admissibility. It is even more remote from the issue of tolling, for § 5 (b) does not even contain the word "final." See pp. 101-102, *infra*.

b) The legislative history of the Finality Act shows that there was no intent to affect the scope of § 5 in any way. The purpose of the amendment was clearly set out in the Senate Report:

> "Section 1 (c) amends the third, . . . and seventh paragraphs of section 11 of the Clayton Act by substituting in lieu thereof subparagraphs (c), . . . and (l). . . . The sole intent of these subsections is to implement the enforcement procedures of the Clayton Act by making applicable the present Federal Trade Commission enforcement provisions. The changes contained in these subsections are **entirely procedural** and **make no substantive changes in law.**" H.R. Rep. No. 580, 86th Cong., 1st Sess. (1959) (set out in full in Appendix V).

Senator Sparkman told his colleagues: "Let me emphasize that the bill before us today proposes no new departure. **Nothing new** is sought to be injected into our well-established and proven concepts of intelligent, effective enforcement procedures. . . ." 105 **Cong. Rec.** 4465

(1959) (the Congressional debates are set out in full in Appendix W.) To the same effect, see 105 **Cong. Rec.** 12732 (1959) (Remarks of Rep. Huddleston); **Hearings Before the Anti-Trust Subcommittee of the House Committee on the Judiciary on H.R. 432, H.R. 2977, H.R. 6049, and S. 726, 86th Cong., 1st Sess. 14 (1959)**; *id.* at 85. (The entire hearings, except for one totally irrelevant document, are set out in Appendix T.)

Nowhere in all of the hearings, reports, and floor debates is § 5 ever mentioned. This entire legislative history is set out in full in Appendices T through W. Nothing was said about treble-damage suits. No one spoke of converting the FTC into a "court of equity," or of "expand[ing]" the FTC, or of granting it "increased powers." Congress' sole purpose in the 1959 amendment was to lighten the burden of the FTC, not to enrich treble-damage claimants.

c) The Finality Act has consistently been held irrelevant by the courts. An argument based upon the 1959 amendment to § 11 was presented to the Court by the plaintiff in **Highland Supply Corp. v. Reynolds Metals Co.**, 221 F. Supp. 15 (E. D. Mo. 1963), and the foregoing authorities were presented in rebuttal. The court there did not even dignify the argument with a comment in the opinion. On appeal, the plaintiff again advanced this notion. Again the foregoing authorities were presented to the court, and the court of appeals, also, did not even mention the argument. **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725 (8th Cir. 1964). In the case of **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967 (D. Maine 1963), plaintiff devoted over half of its brief to an attempt to persuade the court that the Finality Act of 1959 had somehow changed the law. The District Court for Maine wrote an exhaustive opinion on the issue at bar, but declined

to devote even a footnote to what it apparently considered a spurious argument. Finally, and perhaps most significantly, even the district court in this case, while deciding that § 5 applied to FTC proceedings, failed to see any merit in plaintiff's arguments concerning the 1959 amendment. Thus, the court below stands alone as the only court ever to see the 1959 act as even remotely relevant, much less decisive.

d) In any event, the court below made no attempt to relate its unique construction of the Finality Act to the tolling question, and that act has no possible relevance to the tolling section. See pp. 101-02, *supra*.

7. The use of FTC orders as "prima facie evidence" in treble-damage actions would necessitate a fundamental re-evaluation of the evidentiary rules of administrative law.

It has long been settled that a defendant before an administrative body has no constitutional right to the exclusion of hearsay or other evidence inadmissible in a court of law. The specific rationale for this holding is quite pertinent: "[R]ules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is **not to punish** or to fasten liability on respondents **for past conduct but to ban specific practices for the future** in accordance with the general mandate of Congress." **FTC v. Cement Institute**, 333 U. S. 683, 706 (1948). **Accord, FTC v. Ruberoid Co.**, 343 U. S. 470, 473 (1952): "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."[6]

[6] On this point, the court below apparently overlooked one of its own authorities. For the undisputed proposition that the FTC acts "in the public interest and as an administrative arm of the Government," the court cited *FTC v. Gratz*, 253 U. S. 421, 432, 435

If an FTC order is now to be admitted in a treble-damage action, however, it will result in imposing punitive damages on the FTC's victims, for the sole benefit of private plaintiffs. Such a rule would clash with this Court's analysis in **Cement Institute**, and give the commission's order the effect of punishing the defendant. Having suffered the admission of hearsay testimony in an administrative proceeding because no fine or damages would be levied against it as a consequence thereof, the defendant would now be hit from the other side with punitive damages based on the FTC order. The ruling below would require a re-examination of the **Cement Institute** case and perhaps of our entire administrative procedure.

One rationale for barring hearsay evidence from judicial proceedings is that it infringes on the fundamental right of cross-examination: an out-of-court declarant cannot be cross-examined. Admission of the FTC order here would compound the vice, for the hearsay sneaks in through the back door. At least, when hearsay appears in a trial, a jury can recognize it as such and devalue it accordingly.

(1920), "Justice Brandeis dissenting but not as to the functioning of the Commission." R. 79-80. That opinion reads, in part:

> "In considering whether the complaint is sufficient, it is necessary to bear in mind the nature of the proceeding under review. The proceeding is *not punitive*. The complaint is not made with a view to subjecting the respondents to *any form of punishment*. It is *not remedial*. The complaint is not filed with a view to affording *compensation for any injury* alleged to have resulted from the matter charged. . . .
>
> "Instead of attempting to inflict punishment for having done prohibited acts, . . . the act undertook to preserve competition through supervisory action of the Commission. . . . Its action was to be *prophylactic*. Its purpose in respect to restraints of trade was *prevention* of diseased business conditions, *not cure*." 253 U. S. at 432, 434-35.

Apparently, the court below failed to realize that, by making FTC orders available as *prima facie* evidence in treble-damage suits, it was injecting the very element into FTC proceedings which this opinion says Congress did not intend them to have—punishment.

But here the jury would have no knowledge of the hearsay and other judicially incompetent evidence on which the FTC order was based and no opportunity to devalue it.

The objections to the use of FTC orders in civil damage actions are illustrated by **Wright v. Carter Prods., Inc.**, 244 F. 2d 53, 59 n. 4 (2d Cir., 1953), noted at pp. 32-33, *supra*:

> "Since this finding was made in a controversy between different parties **and at an administrative hearing conducted according to its own rules of evidence**, it is admissible in the suit at bar only on the issue of notice and not as evidence of the fact of Arrid's propensities. . . ."

The court below ignored **Cement Institute** and **Wright v. Carter Prods.**, but undertook to meet the underlying objections:

> "Judgments and decrees in government suits are only prima facie evidence of antitrust violations. The defendant still has his 'day in Court' on that issue. . . . He is entitled to offer rebuttal evidence to break down the force and effect of that prima facie evidence . . . ." (R. 88).

If the court below means that the defendant in the treble-damage case may prove to the jury the insubstantial basis of the FTC order, the suggestion is hardly practical. That would compel the defendant to present to the jury the very incompetent evidence which was forced upon him in the administrative hearing! It would also require a complete re-litigation of the FTC hearing, not to prove the substantive offense, but to prove the weight to be given to the FTC order. This procedure could not be what Congress desired.

If the court below means, as it apparently does, that *prima facie* evidence really does not have much significance, then the court has utterly failed to grasp the sit-

uation. The effect of the *prima facie* evidence is to reverse the burden of proof. With one stroke, the plaintiff may rest, and the burden falls on the defendant to **prove a negative**—*e. g.*, to prove that there was no conspiracy, or no substantial effect on commerce. Proof of a negative is always difficult, and often impossible. See, *e. g.*, **Elkins v. United States**, 364 U. S. 206, 218 (1960). Thus, the *prima facie* evidence, far from being insignificant, would normally be conclusive. The defendant would be punished in the amount of treble the "damages," without ever having the right of cross-examination, or the advantage of the other "rules which bar certain types of evidence in criminal or quasi-criminal cases." **FTC v. Cement Institute**, 333 U. S. 683, 706 (1948).

Indeed, the authorities cited by the Court below refute its position. For example, in the congressional debate referred to, Sen. Cummins said: "We are discussing something that never will be really material. Any citizen can have all the advantages from a prima facie case that he could have from a **conclusive** case." **51 Cong. Rec. 13856.** As noted in **65 Harv. L. Rev. 1400, 1407 (1952)**: "[I]t is unlikely that a jury will often find for the defendants on an issue on which a Government judgment is prima facie evidence." Any lawyer who has practiced extensively in the antitrust field knows that government judgments or decrees admitted under §5 in treble-damage suits are, as a practical matter, virtually conclusive on the issue of liability. As one of the leading practitioners in the field, Mr. Jerrold G. Van Cise, told the House committee: "Today, if I can introduce in evidence before a jury a Government judgment, whether you call it prima facie or conclusive, it is going to be considered conclusive by the jury." 1950 House Hearings 52. To expect that a defendant will not be harmed by the introduction of an administrative order, based on hearsay and other judicially incompetent testimony, because the court will instruct the jury that

the order is not conclusive is like expecting a jury to disregard a confession of crime because it has been instructed to do so. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." **Krulewitch v. United States**, 336 U. S. 440, 453 (1949) (Jackson, J., concurring).

The court below went considerably further in deprecating judgments or decrees admitted under § 5: "By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor." (R. 90.) Here, the court clearly misread its authorities. Two cases are cited. In **Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.**, 346 U. S. 537 (1954), the prior government suit, termed "the Paramount Case," had established the existence of a conspiracy in 1945. The conspiracy alleged in the treble-damage action existed four years later, from 1949 to 1950. This Court properly noted that "the relevancy of Paramount to the instant case is slight. . . ." 346 U. S. at 544. In **Partmar Corp. v. Paramount Theatres Corp.**, 347 U. S. 89, 102-03 (1954), this Court held that the "judgment or decree" could not be used to prove facts not determined in the prior adjudication.

In sum, in the cited cases, "the Supreme Court . . . pointed to the limited practical value of the prima facie evidence to a private suitor" **where the evidence and decree were irrelevant.** These rulings do not detract from the effect of **relevant** judgments or decrees.

The court below further defended the admission of administrative orders based on hearsay and other incompetent evidence on the ground that there is precedent in the ICC cases. However, in those cases, the agency itself makes a specific reparation award to the injured private party, and the judicial proceeding is merely a proceeding

to enforce that order, not an entirely separate judicial proceeding. Of course, the administrative order is *prima facie* evidence in a suit to enforce the order itself; the FTC order is a good deal more than *prima facie* evidence in enforcement proceedings in the Court of Appeals. Further, an ICC reparation proceeding awards only single, compensatory damages, and is entirely remedial in nature. A treble-damage suit is, by definition, punitive in nature. Neither the court below, nor any party to these suits, nor any court which has decided this issue, has ever cited a case in which an administrative order has been used to exact a **penalty** on behalf of a private litigant. The ICC analogy is irrelevant.

B. Because No Admissible "Judgment or Decree" Results from FTC Proceedings, the Statute of Limitations is Not Tolled Thereby.

1. Sections 5 (a) and 5 (b) Must Be Construed in Pari Materia.

These subsections are merely two paragraphs in the same section. By all canons of construction, they must be construed together. "While we are concerned with the tolling provisions of the second paragraph of that Section [5] only, the two paragraphs are complementary and must be construed together, . . ." **Sun Theatre Corp. v. RKO Radio Pictures**, 213 F. 2d 284, 290 (7th Cir. 1954). See also **Samuel Goldwyn Prods. v. Fox West Coast Theatres Corp.**, 146 F. Supp 905, 908 (N. D. Calif. 1956).

These are not separate statutes being construed, nor even separate sections of the same statute. They are paragraphs of the same section of the same statute, using nearly identical language, and, of course, enacted at the same time:

> " 'In the absence of anything in the statute clearly indicating an intention to the contrary, where the

> same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere * * *.'"

Schooler v. United States, 231 F. 2d 560, 563 (8th Cir. 1956). See **United States v. Cooper Corp.**, 312 U. S. 600, 606 (1941) ("It is hardly credible that Congress used the term 'person' in different senses in the same sentence" of the Clayton Act). Thus, since the FTC proceeding does not fulfill the requirements of § 5 (a), it falls equally short of the identical requirements of § 5 (b).

2. **The Purpose of the Tolling Provision Was to Guarantee That the Private Treble-Damage Litigants Would Be Able to Take Advantage of Admissible Judgments or Decrees.**

Again, the question of purpose turns first on the **original** legislative intent in 1914. The language of the statute plainly demonstrates that the purpose of the tolling provision was to give a treble-damage claimant adequate opportunity to invoke a "judgment or decree," and therefore the tolling provision could not apply to a proceeding which would not result in an admissible judgment or decree. The House Committee report, referring to the "suit or proceeding" described in § 5 (a), stated the purpose of the tolling provision in the same way:

> "This section also provides that the statute of limitation shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful act of the defendant during the pendency of the suit or proceeding instituted by or on behalf of the United States." H.R. Rep. No. 627, 63d Cong., 2d Sess. 14 (1914).

Cases construing § 5 (b) have specifically held that its purpose was to grant plaintiffs the benefit of § 5 (a): "The

purpose of this enactment was to enable the plaintiff in a private antitrust suit to rely on a prior judgment in a criminal proceeding, or in a civil suit brought by the Government, as proof of a conspiracy." **Orbo Theatre Corp. v. Loew's, Inc.**, 156 F. Supp. 770, 776 (D. D. C. 1957), **aff'd**, 261 F. 2d 380 (D. C. Cir. 1958), **cert. denied**, 359 U. S. 943 (1959). See also **Charles Rubenstein, Inc. v. Columbia Pictures Corp.**, 154 F. Supp. 216, 218 (D. Minn. 1957), *affirmed on this point on authority of opinion below*, 289 F. 2d 418, 422 (8th Cir. 1961); **Momand v. Universal Film Exchange**, 43 F. Supp. 996, 1012 (D. Mass. 1942).

The court in **Farmington Dowel** was very emphatic on this point: "[T]he evident purpose of the tolling provision . . . is to suspend the statute of limitations in order that private litigants may obtain the benefit of the court decrees in the government litigation." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 971 (D. Maine 1963).

The decision below is unclear on this point. The court first said:

> "The defendant 3M also suggests that proceedings which cannot yield judgments and decrees applicable as prima facie evidence under Section 5 (a) cannot toll the statute of limitations under Section 5 (b). . . . The House debates support 3M's view solely to the extent that the tolling provision was to enable the private claimant to reap the benefits of the government action, i. e., the use of a government judgment and decree as prima facie evidence. Union Carbide & Carbon Corp. v. Nisely, 300 F. 2d 561 (10th Cir. 1962). But see 51 Cong. Rec. 16003 (1914)." R. 87.

It seems apparent that the two quoted sentences say the same thing, and that "the House debates support 3M's view" in its entirety. If there is any difference between the two propositions, the court below failed to point out

what it is. The **Union Carbide** case was the sole authority cited by the district court for the proposition that a proceeding which could not possibly produce prima facie evidence could still toll the statute. As will be pointed out below, the **Union Carbide** case is in fact diametrically opposed to that view. The congressional debates referred to state unequivocally that § 5 did **not** give treble-damage plaintiffs "the benefit of the investigation which the Government had made and the evidence which was on file in the case." The court concedes that all other authorities cited support the inter-dependency of §§ 5 (a) and 5 (b).

There is further abundant evidence that Congress, in 1914, did **not** intend to toll the statute simply to let a plaintiff wait and take advantage of evidence in the government case where no admissible "judgment or decree" could possibly result. For example:

> "The Senator knows . . . that neither under the section as he drew it nor as it passed the Senate will it be possible to introduce, in the private action, the evidence taken in the Government suits. It is the judgment only that is admissible, not the evidence upon which it was founded." 16149. (Remarks of Sen. Walsh.) (Further quotations appear in Appendix H.)

Indeed, an amendment was actually introduced in the House to give private litigants the benefit of evidence adduced in government proceedings by making such evidence admissible in private treble-damage suits. Following discussion, during which the bill was criticized, *inter alia*, for giving the benefit of such evidence to the defendant as well as the plaintiff, Rep. Floyd, speaking for the committee, asked the House not to adopt the amendment. The amendment was then withdrawn. 9494-95.

Thus, in 1914, the sole purpose in tolling the statute of limitations was to give claimants the benefit of a judgment or decree.

"However," the court of appeals continued, "the decision of the court below that the two subsections should not be regarded as interdependent does have substantial support." R. 89. This sentence appears to refer to the possibility, discussed in the next paragraph of the opinion, that Congress, in 1955, somehow intended to broaden the tolling provision so as to toll the statute of limitations without regard to whether an admissible judgment or decree could conceivably result from the proceedings. Here, the court apparently **concedes** that, at least until 1955, an FTC proceeding could not toll the statute unless an FTC order were admissible: "The above mentioned intention in 1914 does **not seem as plain** in 1955 . . ." R. 89. The "substantial support" for a contrary conclusion today consists of four items.

First, in 1955, Congress added the letters "(a)" and "(b)" to the two paragraphs of § 5. Notably, the court failed to cite a single instance where the lettering of two paragraphs of the same section of a statute, in which the "subsections" were already divided into separate paragraphs, caused language in one subsection to be given a different interpretation from identical language in another subsection, or resulted in a substantial change in the meaning of an existing statute! Clearly, such revisions "are changes hardly substantial enough to warrant any changed construction of the section." **United States v. Ryan**, 284 U. S. 167, 174 (1931).

Second, the court states that: "By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor" (R. 90). The total irrelevance of the authorities relied on to support this extraordinary statement has already been demonstrated at p. 72, *supra*. It is matched by the irrelevance of the statement, even if the statement were valid.

Third, the court attempts to establish that "Section 5 (b) enables 'a plaintiff to take advantage of facts un-

covered' as a result of the government proceedings" by citing only the very district court opinion it is reviewing!

Fourth, the court quotes a sentence from the Senate Report on the 1955 amendent:

> "[T]he plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint." S. Rep. No. 619, 84th Cong., 1st Sess. (1955) (R. 90).

The court fails to note the context of this sentence, which supports the granting of a minimum of one year from the close of the government case within which a treble-damage plaintiff may file suit. The context is totally irrelevant to the suggestion that the statute be tolled when no admissible "judgment or decree" can follow from the government suit. Further, the cited page of the report and the succeeding page are the very pages on which the committee specifically set out the only changes being made in the tolling provisions. One cannot read these two pages, in the light of the existing law prior to the 1955 amendment, without concluding that Congress intended no change in the interdependency of subsections (a) and (b). In sum, there is "**nothing** in the legislative history" to support the lower court's view. **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 971 n. 7 (D. Maine 1963).

Further, there is substantial affirmative evidence in the legislative history of the 1955 amendment indicating that Congress did not intend to grant private litigants any advantage from the government case other than a "judgment or decree" admissible under § 5 (a). For example, in the 1950 House Hearings, two congressmen expressed

direct antipathy to giving a treble-damage claimant any advantage from government proceedings other than the use of a final judgment or decree:

> "Mr. Michener: I had, within the last few months, an attorney from Michigan come to see me in Washington. He wanted me to assist him in getting certain files in the Department of Justice, which files included an investigation the Department had made of an alleged violation of the antitrust laws. I asked him what he wanted that information for, and he said that he could recover triple damages if he brought suit. Now that the Department of Justice had looked up this case and had done all of the work, there wasn't anything for him left to do except to start suit; and in those files he would find his proof.
>
> **"Now, would you want to give a premium to attorneys of that type, who sit around and wait until the Government has developed a case, has spent the money, and then bring suit for triple damages, and get triple damages based on the work that the Government has done?**
>
> "Mr. Bryson: And maybe have a contract for 50 percent of what they recover.
>
> "Mr. Michener: Yes.
>
> "Mr. Handler: Congressman, the pending bill would not assist the counsel in the case that you have put. The files of the Government are closed to the private litigant. He must establish his case following the normal procedure applicable in the Federal courts himself or he must stand by and await the conclusion of the Government litigation and it is only after that litigation is concluded, and final judgment is entered after contest, that the judgment or decree becomes available to him." 1950 House Hearings 5. (See App. M.)

Note, too, the witness' statement that: "The files of the Government are closed to the private litigant." Had Con-

gress truly desired to give private litigants "the benefits of a Government investigation," it could easily have done so by opening the government files.

Also significant is the treatment accorded the new government single-damage suits. H. R. 7905, proposed in 1950, excluded such damage suits from the "prima facie evidence" provisions, but provided that the statute of limitations would be tolled during such suits. This latter provision met with opposition:

> "It does not seem necessary or advisable to include within the purview of section 5 (b) a civil action brought by the United States to recover for damages pursuant to section 4 (b) of the proposed act. **A judgment in such a civil action is expressly excluded from the provisions of section 5 (a)** making judgment [*sic*] or decrees in civil or criminal proceedings brought by the United States conclusive evidence against a defendant in a triple-damage action. **There seems to be no good reason, therefore, why under section 5 (b) the statute of limitations should be suspended** during the pendency of a Government suit to recover damages. . . . There is no reason, however, for making the pendency of a private lawsuit by the Government to recover damages an excuse for suspending the operation of the limitations act." 1950 House Hearings 97 (Comment of the Standing Committee on Commerce of the American Bar Association).

These amendments were retained in the original version of H. R. 3708 as considered by the committee, and again a bar association pointed out to the committee:

> "A judgment in a damage suit by the United States, however, would not be evidence against a defendant in a triple-damage suit, and there is no reason for further suspending the statute of limitations

pending such damage suits." 1951 House Hearings 28 (Report of Committee on Federal Legislation of The New York County Lawyers Association).

When the House committee report issued, it **specifically excluded government damage suits from the tolling provisions**, and this exclusion prevailed when the amendment was finally passed. No clearer expression could be found of legislative intent that the statute of limitations should be tolled only for proceedings which can result in a judgment or decree admissible as *prima facie* evidence.

Moreover, the "**3M**" court's policy decision, favoring the tolling of the statute, to give plaintiff an opportunity for whatever discovery he might be able to engage in with respect to the results of an FTC investigation, ignores the basic purpose of treble-damage actions—to aid in enforcement of the antitrust laws. "The three-fold damage clause of Section 15 was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement." **Weinberg v. Sinclair Refining Co.**, 48 F. Supp. 203, 205 (E. D. N. Y. 1942). **Accord, Maltz v. Sax**, 134 F. 2d 2, 4 (7th Cir.), **cert. denied**, 319 U. S. 772 (1943). The main purpose of the antitrust laws "was to protect the public from monopolies and restraint of trade, and the private right of action for treble damages was incidental and subordinate to that main purpose." **Kinnear-Weed Corp. v. Humble Oil & Refining Co.**, 214 F. 2d 891, 893 (5th Cir. 1954), **cert. denied**, 348 U. S. 912 (1955). Even the court below recognized that the purpose of "private antitrust suits" was not only to "supplement government actions" but "perhaps in some cases" to "make them unnecessary" (R. 74). If the decision below, which greatly enlarges the coverage of § 5, is allowed to stand, it will permit potential claimants to sit back and let the FTC do their work for them. The legislative history of the 1955 amendment demonstrates direct antipathy to such a result (see

the remarks of Reps. Michener and Bryson cited at p. 79 *supra*).

Furthermore, this suggestion would permit a potential plaintiff to force the agencies charged with enforcement of the Clayton Act (the FTC, the FCC, the ICC, the CAB, and the Federal Reserve Board) to do his investigating for him. The jurisdiction of all such agencies is mandatory. A complainant may set an FTC investigation in motion; thereafter:

> "Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint . . . ." 15 U. S. C. § 21(b).

Thus, if reasonable grounds were uncovered to make out a case, a complaint would issue, and the private party would merely have to wait until the agency had done most of his work for him and then bring his suit. In this way, the primary purpose in granting private litigants a cause of action under the antitrust laws would be effectively emasculated by a decision tolling the statute of limitations during the pendency of agency proceedings.

Finally, Congress in 1955 specifically inveighed against procedures which "prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts." S. Rep. No. 624, 84th Cong., 1st Sess. 6 (1955). A decision overturning 49 years of settled practice and greatly enlarging the scope of the tolling provisions undoubtedly would have such an effect.

Significantly, the court below declined to rely on the only judicial authority cited by the district court for the proposition that § 5(b) should be given a different interpretation from § 5(a). In **Union Carbide & Carbon Corp.**

v. Nisley, 300 F. 2d 561, 569 (10th Cir. 1962), the United States had sued and obtained a judgment against defendant for conspiracy. The private suits

> "alleged substantially the same conspiracy against the same defendants as in the government suit. They relied upon the same documentary and oral proof to establish the conspiracy, and they also relied 'in part' on the same means for the effectuation of the same conspiracy." 300 F. 2d at 570.

Defendant apparently contended that, since certain "overt acts" alleged by plaintiffs were not included in the government conspiracy case, the statute of limitations was not tolled as to those overt acts, even though the conspiracy was the same in both suits. The court quite properly rejected this argument: "There was substantial identity of subject matter, and this was sufficient to suspend the running of the statute." 300 F. 2d at 570.

This result was clearly commanded by the statute: "[T]he running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof. . . ." 15 U. S. C., § 16 (b). If the same conspiracy is the basis of the government suit, the statute of limitations is tolled as to the "right of action" for that conspiracy. The opposite result would have been ridiculous, requiring plaintiff to bring suit as to certain overt acts before the statute ran, and as to others at the end of the government proceedings (both suits for the same conspiracy!). Thus, the holding is that, in the case of a conspiracy, when the statute is tolled as to part of the cause of action, it is tolled as to the whole cause of action. This is quite a different thing from saying that Congress intended to toll the statute for a private litigant so that he will not have to conduct his own discovery, even

though the final judgment or decree will not be admissible as *prima facie* evidence.

Actually, the language of the case is directly contrary to the purpose for which it was cited by the district court:

> "The purpose of the first paragraph of section 5 was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions'; . . .
>
> "The **corollary purpose** of the tolling provisions of the second paragraph of Section 5 **is to vouchsafe the intended benefits of related government proceedings** by suspending the running of the statute of limitations until the termination of the government proceedings and allowing the private suitor one year thereafter in which to prepare and file his suit." 300 F. 2d at 569.

The "intended benefits" of the second paragraph relate to the advantage of the "estoppel doctrine" in the first paragraph. Where the final judgment or decree is not admissible, the plaintiff gains no advantage from the estoppel doctrine. Without such "intended benefits," the "corollary purpose" disappears, and the statute is not tolled.

The court below was thus quite correct in rejecting the district court's error, and in citing **Union Carbide** for the proposition that: "[T]he tolling provision was to enable the private claimant to reap the benefits of the government action, i. e., the use of a government judgment and decree as prima facie evidence." R. 87. **Accord, Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 971 n. 7 (D. Maine 1963).

In sum, because an FTC order is not admissible under § 5 (a), the statute of limitations is not tolled by the FTC proceedings.

III. The Language and Legislative History of the Tolling Statute Preclude Tolling for FTC Proceedings.

A. The 1914 Legislation.

1. The language of the original § 5 (b) excludes an FTC proceeding, because such a proceeding is not a "suit or proceeding in equity" nor is it "instituted by the United States."

As enacted in 1914, the second paragraph of § 5 [now § 5 (b)] read:

> "Whenever any suit or proceeding in equity or criminal prosecution is **instituted by the United States** to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

As with the first paragraph, this language is clearly judicial in tone, and was intended to apply only to judicial proceedings. See pp. 13-14 *supra*. An FTC hearing is not a "suit or proceeding in equity." See pp. 16-21 *supra*.

There is one significant difference between § 5 (b) and § 5 (a). Section 5 (a) requires that suit be "**brought by or on behalf** of the United States." An FTC proceeding is not "brought by or on behalf of the United States." See pp. 21-22 *supra*.

Even if an FTC proceeding could be said to have been brought "on behalf of the United States," however, it certainly was not "instituted **by** the United States." **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725, 730-31 (8th Cir. 1964); **Volasco Prods. Co. v. Lloyd**

A. Fry Roofing Co., 223 F. Supp. 712, 713 (E. D. Tenn. 1963). A leading case is **United States Alkali Export Ass'n v. United States**, 325 U. S. 196 (1945), where the defendant resisted an action by the United States under the Sherman Act on the ground that exclusive jurisdiction rested in the FTC. The court rejected the defense, upholding the concurrent jurisdiction of the FTC and the United States in language which clearly demonstrates that the commission is not the United States:

> "The contention is that since the alleged violations are being committed by and on behalf of export associations which have conformed to § 5 of the latter Act, the authority of the **United States** to maintain the suit is suspended until the **Federal Trade Commission** has proceeded against the associations by way of investigation and, if found appropriate, by way of recommendations to them and reference of its findings to the **Attorney General**, as specified in § 5.
>
> "It is conceded that § 5 contains no explicit restriction on the authority of the **United States** to institute antitrust suits in the normal way, nor any explicit requirement that resort be had to the **Commission** prior to the institution of such an antitrust suit. . . .
>
> ". . .
>
> ". . . [I]nvestigations by the **Commission** have never been deemed prerequisite to antitrust suits by the **United States**; and there is nothing to suggest that Congress, in authorizing the **Commission** to investigate export associations, intended to place such investigations on any different footing than others, which the Commission had already been authorized to conduct." 325 U. S. at 205-07.

There are other cases where this Court has specifically recognized the distinction between "the United States" and "the Federal Trade Commission," *e. g.*, **United States v. Cooper Corp.**, 312 U. S. 600, 612 n. 17 (1941): "Repre-

sentative Webb, the chairman of . . . [the House Judiciary] Committee, mentioned the civil remedies available under the bill as treble damage actions by persons, suits by the **Federal Trade Commission**, suits by **the United States** for injunctions, and similar suits by persons."

Moreover, in many other statutes, and especially in the Clayton Act and FTC Acts themselves, Congress has carefully and explicitly distinguished between the "commission" and the "United States." Note the careful usage in the contemporaneous FTC Act:

§ 6 (38 Stat. 721 (1914), now 15 U. S. C., § 46): [T]he **commission** shall also have power . . . .

> "(c) Whenever a final decree has been entered against any defendant corporation in any suit **brought by the United States** . . . to make investigation [of compliance] . . . and upon the application of the **Attorney General** it shall be **its** duty to make such investigation. **It** shall transmit to the **Attorney General** a report . . ."

§ 7 (38 Stat. 722 (1914), now 15 U. S. C., § 47): "[I]n any suit in equity brought **by or under the direction of the Attorney General** as provided in the antitrust Acts, the court may. . . . refer said suit to the **commission**, as a master in chancery . . ."

§ 9 (38 Stat. 722 (1914), now 15 U. S. C., § 49): " . . . Upon the application of the **Attorney General of the United States**, at the request of the **commission**, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding . . . [compliance with this Act] or any order of the **commission** . . ."

§ 10 (38 Stat. 723 (1914), now 15 U. S. C., § 50): ". . . If any corporation required . . . to file any . . . report shall fail so to do within the time fixed by the **commission** . . . the corporation shall forfeit to the **United States** the sum of $100 . . . payable into the

Treasury of the **United States**, and shall be recoverable in a civil suit **in the name of the United States** . . . It shall be the duty of the various district [now United States] attorneys, under the direction of the **Attorney General of the United States**, to prosecute for the recovery of forfeitures."

This distinction has been preserved in later additions to the Act:

§ 13 (a) (52 Stat. 115 (1938), now 15 U. S. C., § 53 (a)): "Whenever the **Commission** has reason to believe [that any person is about to disseminate unlawful false advertising] . . . the **Commission** by any of **its** attorneys . . . may bring suit in a district court of the United States . . . [for injunction]."

§ 16 (52 Stat. 116 (1938), now 15 U. S. C., § 56): "Whenever the **Federal Trade Commission** has reason to believe that any person . . . is liable to a penalty . . . **it** shall certify the facts to the **Attorney General**, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement . . ."

Note also § 13 of the Clayton Act (15 U. S. C., § 23): "In any suit, action, or proceeding brought **by or on behalf of the United States** subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district. . . ." If Congress had intended this subpoena power to apply to the FTC, it would have been entirely unnecessary for it to provide, as it did in § 9 of the FTC Act (15 U. S. C., § 49), that: "[T]he **commission** shall have power to require by subpoena the attendance and testimony of witnesses . . . . Such attendance of witnesses . . . may be required from any place in the United States, at any designated place of hearing."

As recently as 1959, in enacting the very Finality Act on which the court below apparently relied, Congress demonstrated its continued clear understanding of the

distinction between the legislative terms "commission" and "United States," providing in 15 U. S. C., § 21 (l): "Any person who violates any order issued by the **commission** . . . shall forfeit and pay to the **United States** a civil penalty . . . which shall accrue to the **United States** and may be recovered in a civil action brought by the **United States.**"

The lower courts, as well as this court, have consistently recognized that the United States and the FTC are separate entities, not to be confused with one another. For example, in **FTC v. Nash-Finch Co.**, 288 F. 2d 407 (D. C. Cir. 1961), a corporation sought a declaratory judgment against the FTC. The commission sought dismissal of the suit on the ground that "the United States is an indispensable party" and had not been joined. In deciding that "the United States" was not an indispensable party, the court held: "But appellee does not now complain of any action taken or threatened by the **United States** for penalties. Action of the **Commission** alone is now challenged." 288 F. 2d at 410.

In **United States v. Aluminum Co. of America**, 1 F. R. D. 48, 49 (S. D. N. Y. 1938), the court not only recognized that "the United States" and the FTC were not the same party, but held that they were not even in privity for purposes of the admission of evidence. The question therein was whether the testimony of a witness, since deceased, taken in an FTC proceeding, was admissible in a later Justice Department suit against the same defendant. This issue turned

> "on the existence of a relationship of privity between . . . the Federal Trade Commission and the United States.
>
> ". . .
>
> "The United States was not a party to the Federal Trade Commission proceeding. Only the Federal

> Trade Commission was a complainant in that proceeding." 1 F. R. D. at 49.

Finding no "privity in law," the court excluded the testimony.

An administrative agency such as the FTC is a separate entity, capable of suing and being sued in its own right. The United States and an agency may appear as separate parties in a suit and present opposing views, **e. g., Henderson v. United States**, 339 U. S. 816 (1950). The United States may refuse to appear in a case, but allow an agency to appear and present views in conflict with those of the United States, **e. g., Standard Oil Co. v. FTC**, 340 U. S. 231 (1951) [for discussion of these and numerous other examples, see Stern, **"Inconsistency" in Government Litigation**, 64 Harv. L. Rev. 759, 760 (1951)]. Even more persuasive is the fact that the United States may bring an action **against** an agency to set aside an order. Such litigation does not constitute a sham proceeding, but presents a "case or controversy" justiciable under Article III of the Constitution, **e. g., United States v. ICC**, 337 U. S. 426 (1949). From these cases, it is clear that an FTC proceeding is not "instituted by the United States."

In the original Clayton Act, the ICC also was given power to enforce its provisions. 15 U. S. C. § 21 (a). The relationship between the ICC and the United States is therefore of significance, in determining congressional intent. By the time the Clayton Act was passed in 1914, it had long since been settled that an agency such as the ICC was "a body corporate, with the legal capacity to be a party plaintiff or defendant in the federal courts . . . ." **Judson, Interstate Commerce** 493 (1912). Congress was well aware of this distinction and made use of it with regard to the ICC. Prior to 1910, only the ICC or an injured party could bring an action to enforce an order other than for the payment of money. By the Act of

June 18, 1910, the United States was added as a **separate** party authorized to bring such actions:

> "If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the **Interstate Commerce Commission** or any party injured thereby, or **the United States,** by its Attorney General, may apply to the Commerce Court for the enforcement of such order." 36 Stat. 555 (1910). [This provision is now contained in 49 U. S. C., § 16 (12).]

By the Commerce Court Act of June 18, 1910, only four years before the original enactment of the tolling provision, Congress also provided:

> "That all cases and proceedings in the Commerce Court which but for this Act would be brought **by** or against the **Interstate Commerce Commission** shall be brought **by or against the United States,** and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved. . . . **Provided, That the Interstate Commerce Commission** and any party or parties in interest to the proceeding before the Commission, . . . may appear as parties thereto of their own motion and as of right, and be represented by their counsel, . . ." 36 Stat. 539 (1910). (This provision is now covered by 28 U. S. C., §§ 2321-23.)

See 36 Stat. 1150-51 (1911). Thus, Congress demonstrated its clear understanding of the distinction, in litigation, between the "United States" and the independent commissions. These provisions were thoroughly discussed in **ICC v. Oregon-Washington R. R. & Nav. Co.,** 288 U. S. 14, 22-27 (1933), and this Court accepted the distinction between the ICC and the United States without question.

A holding in the case at bar that a proceedin, brought by the FTC is a proceeding "**instituted by the United**

States'' would apply equally to an ICC proceeding enforcing the Clayton Act (and to an FCC, a CAB, or a Federal Reserve Board proceeding). Such a holding would make the above statutes and Supreme Court decisions meaningless, and would fly in the teeth of the clearly expressed congressional purpose to distinguish between ''the United States'' and an administrative agency.

The court below made no attempt to refute or distinguish the above authorities. Rather, the court set forth generalities of the relationship of '' 'efficient cooperation' '' between the FTC and the Justice Department, of the FTC ''as a 'representative of the United States,' '' and of the ''reality'' that ''the Commission functions . . . in the public interest and as an administrative arm of the Government'' (R. 78-80). These generalizations are totally irrelevant to the specific requirement of a suit ''instituted by the United States.'' Even if these generalizations were to some slight degree relevant, they could go only to show that the FTC acts ''**on behalf of** the United States.'' But the requirement of § 5 (b) is a suit ''instituted **by** the United States.'' The court below apparently failed to note that the phrase ''on behalf of'' does **not** appear in § 5 (b), for, while ostensibly setting out to prove that an FTC proceeding is ''instituted by the United States'' (R. 78), the court goes on to state that the ''question'' is whether an FTC proceeding is ''a proceeding **on behalf of** the United States'' (R. 81), and holds that an FTC ''action must be regarded as one **on behalf of** the United States'' (R. 79). Perhaps, had the lower court accurately noted the precise language of § 5 (b), it would have reached a different conclusion.

The court's unique construction of § 5 (a), *i. e.*, that the ''suit or proceeding in equity'' requirement therein was met by ''the proceeding before the Court of Appeals,'' suggests another possible explanation for the difference

between § 5 (a) ("**brought** by **or on behalf of** the United States") and § 5 (b) ("**instituted by** the United States"). If it be assumed *arguendo*, despite the overwhelming evidence to the contrary (see pp. 16, 18-21, 46-49 *supra*), that a decree of a court of appeals enforcing an FTC order was intended to be admissible under § 5 (a), it is irrefutably clear that FTC proceedings could not have tolled the statute of limitations. As noted earlier, under the original statute, there was no time limit within which either the commission or the respondent must bring enforcement or review proceedings in the court of appeals. If the statute were tolled from the institution of FTC proceedings until the court of appeals issued a decree affirming the FTC order, the statute could be tolled ten, twenty, or fifty years, or, indeed, forever. Theoretically, it is conceivable that Congress intended that, when the FTC sought and achieved enforcement of its order, such order should then be admissible, but on that assumption Congress surely recognized that to apply the tolling provision to FTC proceedings would lead to the absurd result of tolling the statute forever, and surely intended to foreclose such an absurdity by omitting the phrase "on behalf of" from § 5 (b). There would be some logic to such a result, because the FTC could not institute enforcement proceedings until the respondent had violated the FTC order, and, the respondent having thus been forewarned that its conduct was illegal, such punishment for its conduct could have been considered proper. Some additional support for such an argument might be found in the use of the term "instituted" in § 5(b) in place of the term "brought" used in § 5 (a), since the former term is more clearly limited to the initiation of proceedings than is the latter term.

In sum, whatever may be contended about the FTC as a "representative" of the United States, an FTC proceeding is clearly not one **"instituted by the United States."**

2. The History of the 1914 Legislation Demonstrates That Congress Did Not Intend FTC Proceedings to Toll the Statute of Limitations, and Deliberately Excluded From the Tolling Statute Proceedings "on Behalf of the United States."

As in the case of the "prima facie" evidence clause, nowhere in the voluminous debates and committee reports does any suggestion appear that FTC proceedings would toll the statute of limitations. Both the FTC Act and the Clayton Act were considered in the same session of Congress, in 1914, and numerous cross-references appear throughout the debates. Had Congress entertained any intent that FTC proceedings should toll the statute of limitations, it seems inconceivable that such intent would remain unexpressed and undebated.

On the contrary, the debates and reports of 1914 conclusively establish that Congress intended § 5 to apply only to injunction or criminal proceedings brought by the United States in the federal courts. See pp. 33-49 *supra*.

Beyond that, assuming *arguendo* that an FTC proceeding could be deemed a proceeding "on behalf of" the United States within the meaning of § 5 (a), S. Rep. No. 698, 63d Cong., 2d Sess. (1914) (set forth in full in App. J), conclusively demonstrates that Congress **deliberately excluded such proceedings from the scope of the tolling provision** (§ 5 (b)).

That report shows that the Clayton Bill, as passed by the House, would have tolled the statute for suits "brought by or **on behalf of** the United States," using language identical to the language of the *prima facie* evidence clause. The Senate Committee made numerous changes in the bill, including two of vital significance: (1) § 11 (then § 9b) was added, giving the FTC power to enforce the Clayton Act prohibitions; and (2) apparently fearing that the newly added FTC enforcement proce-

dures might be improperly considered, by the courts, to be proceedings "on behalf of" the United States so as to toll the statute of limitations, the Committee **struck from the tolling provision** the phrase "brought by or on behalf of the United States" and deliberately inserted in its place the more restrictive language "instituted by the United States." This latter language was preserved through final passage. "That Congress had in mind the separate and distinct meanings of these two expressions is clearly demonstrated . . ." by this deliberate change. **United States v. Wurts**, 303 U. S. 414, 417 (1938). The Congress could not more clearly and emphatically have rejected the interpretation advanced by the court below.

Further analysis of the bill as reported out by the Senate Committee offers further possible explanation of the words "on behalf of" in the *prima facie* evidence clause, and their exclusion in the tolling clause. The FTC proceedings authorized in that draft were not reviewable in the court of appeals, as in the final draft. In case of failure to obey an FTC order, the Senate Committee draft provided (§ 9b) that "the said **commission**, by its attorneys, if any it has, or by the appropriate **district attorney** acting under the direction of the **Attorney General of the United States**, may apply for an enforcement of such order to the district court . . . [which] shall have power to make . . . such orders and decrees as may be just and equitable . . ." The order of the commission was to be prima facie evidence **in that enforcement proceeding**, but the respondent could adduce additional evidence, as in the case of the ICC enforcement proceeding. See pp. 72-73, *supra*. The proposed *de novo* judicial enforcement proceeding would have resulted in a judicial decree, which the Senate Committee may well have considered appropriate for admission as *prima facie* evidence in a treble damage suit. But such proceedings, like the appellate review proceedings authorized in the final law (see p. 93, *supra*), were clearly inappropriate for tolling the statute of limitations,

because they might not commence for many years, if ever, and the statute of limitations would be tolled indefinitely.

Section 9b of the Senate Committee bill is further instructive for its distinction between the United States and the commission:

> "Any party to any proceeding brought under the provisions of this section before either the Interstate Commerce Commission or the **Federal Trade Commission . . . as well as the United States** by and through the Attorney General thereof, may appeal from any final **order** made by either of such **commissions** to any court having jurisdiction to enforce any **order** . . ."

3. The Total Absence of Any Attempt to Apply § 5 (b) to FTC Proceedings Indicates that No Such Application Was Intended.

> "Although Section 5 of the Clayton Act has been in effect for 49 [now 50] years, counsel have called to the Court's attention no case, prior to 1963, in which a plaintiff has even attempted to assert that a Federal Trade Commission proceeding tolled the statute of limitations in a private antitrust action under Section 5(b). In such circumstances, the observation of Mr. Justice Frankfurter in Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 352, . . . (1941), is pertinent:
>
> '[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'
>
> Accord, United States v. Cooper Corp., 312 U. S. 600, 613-14 . . . (1941)." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973-74 (D. Maine 1963).

B. **The 1955 Amendment Did Not Enlarge the Scope of § 5 (b).**

The court below correctly concluded that the 1955 amendment did not enlarge the scope of § 5 (b). Consequently, that contention will be discussed only briefly here.

1. **The Term "Civil Proceeding" Does Not Include FTC Proceedings.**

The only change in § 5 (b) since its passage in 1914 which has been urged as relevant in any way is the substitution, in 1955, of the phrase "civil or criminal proceeding" for the phrase "criminal prosecution or suit or proceeding in equity." The requirement that the proceeding be "instituted by the United States" remains unchanged. As previously shown, an FTC proceeding is not "instituted by the United States," and even if this requirement were satisfied, an FTC proceeding is still not a "civil or criminal proceeding." See pp. 16-21, *supra*.

2. **Legislative history conclusively demonstrates that the 1955 legislation was not intended to effect any change in § 5 (b).**

First, it has already been established that no substantive change was intended by an identical amendment to § 5 (a), and that § 5 in its entirety was to remain substantively unchanged (see pp. 52-63, *supra*). It would indeed be strange if Congress intended the substitution of identical language for identical language, in two paragraphs of the same section of a statute, to work a substantive change in § 5 (b) and not in § 5 (a).

Second, it was emphatically stated in the committee hearings that no change was intended in § 5 (b):

> "The Chairman: . . . Section 5 of the Clayton Act in the second paragraph reads as follows:
>
> ". . .

"Mr. Keating: H. R. 7905 in no way changes the subsection to which the chairman has referred; is that right? It still is left in the law as it is?

"The Chairman: That is why I think the draftsmanship is wrong.

"Mr. Bernhart: I think the draftsmanship is right on that point." 1950 House Hearings 16. (See App. M.)

Note that the term "civil or criminal proceeding" was used in H.R. 7905.

Third, the Senate debate also contains a specific statement that no change was intended in the scope of the tolling provision:

> "Present section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. **This period is continued** in the present bill." 101 Cong. Rec. 9165. (Remarks of Sen. Kilgore.)

Fourth, throughout the various drafts of the bill, various changes in the tolling provision were specifically enumerated. Nowhere is it suggested that substitution of the words "civil or criminal proceeding" was more than a language change. For example, H.R. Rep. No. 422, 84th Cong., 1st Sess. 2 (1955), delineates the changes made in the tolling provisions:

> "Section 2 of the bill amends section 5 of the Clayton Act by providing that the statute of limitations with respect to private antitrust actions shall be tolled for an additional year after the termination of a Government antitrust proceeding in order to permit the parties to take full advantage of a final Government decree as prima facie evidence of their case and to have sufficient time in which to file suit.
>
> "It further provides that while the period in which to bring a private treble damage action shall in no

> case be less than 4 years, nevertheless, in instances where a private suit is tolled because of the pendency of a Government proceeding, private treble damage actions must be instituted within 1 year after the termination of the Government's case if, at the end of such period, 4 years or more shall have elapsed since the cause of action accrued. This requirement is designed to prevent interminable delay and congestion of court calendars, as well as encouraging the prompt adjudication of private treble damage suits."

A later section of the Report (quoted in relevant part in Appendix G) explains these changes. There is not the slightest intimation of a design to alter the coverage of § 5 (b). Thus, the committee told the Congress what changes the bill would make, and made no mention of a change concerning administrative proceedings.

Similarly, S. Rep. No. 619, 84th Cong., 1st Sess., 5-6 (1955), states: "This bill makes several important changes in the tolling provisions of existing law," and proceeds to list them. First, "the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter." Second, the bill requires "that the plaintiff bring this suit within 4 years after it accrued or within 1 year after the Government's case has been concluded." That is all; there are no other changes. (Relevant matter in this Report is set out in full in Appendix G.)

On the floor of the House, Congressman Celler, Chairman of the Judiciary Committee and of the subcommittee which prepared the bill, explained carefully to the House the changes made in its tolling provisions, but mentioned no changes other than those noted above in the committee reports. 101 **Cong. Rec.** 5139 (1955). Senator Kilgore also enumerated these same changes in the tolling provisions, making no reference to any change encompassing

FTC proceedings. 101 **Cong. Rec.** 9165-66. (Quoted in full in Appendix G.) Thus, in the Senate Report, the House Report, on the floor of the Senate, and on the floor of the House, the changes made in the tolling provisions were explicitly set out. Expansion of the scope of subsection 5 (b) was definitely not among them. If the committees which handled this bill intended to make any such change in the law, they fraudulently concealed their purpose from the Congress. Even if this Court were inclined to impute such conduct to the committees and their chairmen, it would remain true that the Congress itself had no such purpose.

Further, statements from the Department of Justice and the FTC were placed in the record at the 1950 hearings. The Justice Department pointed out that the bill in question would amend § 5 "by providing that the statute would also be tolled by the institution of a suit for damages brought by the United States." No other amendment was noted. 1950 House Hearings 62-65. The FTC report merely paraphrased the language of the amended section without comment. 1950 House Hearings 66. Thus, neither of the two agencies responsible for the enforcement of the antitrust laws stated that the proposed amendment to § 5 would or should toll the statute of limitations during the pendency of FTC proceedings. (Appendix G includes the paragraph of the FTC report restating the tolling provisions.)

The legislative history of the 1955 amendment thus makes it quite clear that no change in the scope of the tolling provisions was intended.

3. **Congress Changed the Wording of § 5 (b) to Conform to the Federal Rules of Civil Procedure.**

The Federal Rules of Civil Procedure abolished the distinction between law and equity. "There shall be one form of action to be known as 'civil action'." Fed. R. Civ. P. 2.

To have amended § 5 without conforming the language therein to current procedure would have been very poor draftsmanship. Congress had no other intent in revising the language of § 5 (b). "[T]he reasonable conclusion is that Congress merely changed the language to conform to that of the Federal Rules of Civil Procedure, . . ." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972 (D. Maine 1963).

C. **The Finality Act of 1959 is totally irrelevant to the interpretation of § 5 (b).**

The court below advanced the novel assertion (unheard of in 49 years of litigation) that review proceedings in a court of appeals satisfied the original requirements of § 5 (a) and resulted in an admissible "judgment or decree," and then asserted that, since the Finality Act of 1959 made FTC orders final if the respondent did not seek review within sixty days, FTC orders somehow became admissible also. The logical and legal objections to both the premise and the conclusion are detailed at pp. 16, 18-21, 46-49, 64-68, *supra*, together with a complete examination of all the relevant legislative history, which proves conclusively the total absence of any hint of congressional intent to achieve such a result.

The court below made no attempt to relate its analysis of § 5 (a) with regard to review proceedings to the tolling provision (§ 5 (b)). Nor did the court attempt to relate the supposed effect of the Finality Act of 1959 on § 5 (a) to the tolling paragraph of § 5. The court simply jumped from its erroneous conclusion as to § 5 (a), to a further conclusion as to § 5 (b), without consideration of the statutory language.

The irrelevancy of this 1959 shift in the burden of seeking review is inescapable. The only effect of the 1959 legislation is upon the status of FTC orders **after** they are handed down by the commission. The Act simply

makes such orders "final?" Yet § 5 (b) does not require a "judgment or decree," much less "finality." While the 1959 Act supplied one of the requirements of § 5 (a) (finality), it supplied **none** of the requirements of § 5 (b).

An essential element of the lower court's analysis is that, from 1914 until 1959, FTC proceedings did not toll the statute of limitations. That is correct. In terms of the statutory language, the court necessarily held that an FTC proceeding either is not a "civil proceeding" (or a "suit or proceeding in equity"), or is not "instituted by the United States," or both. These are the only relevant requirements of § 5 (b) on which the lower court could rely. There is no way in which the 1959 amendment to the Clayton Act could have changed those requirements, or could have transformed FTC proceedings to fit those requirements.[7] This same spurious argument was made to the courts noted at p. 67, *supra*, and was not even deemed worthy of comment by those courts.

D. **The Decision Below Is Directly Contrary to That of All of the Other Federal Courts Which Have Considered the Question, and the Antitrust Bar Agrees that FTC Proceedings Are Not Within the Scope of § 5 (b).**

From 1914 until the district court's decision in April, 1963, there is no record of a treble-damage plaintiff even having considered it worthwhile to contend that FTC proceedings tolled the statute of limitations. The district court's unprecedented decision was thereafter presented to one court of appeals and three district courts, and decisively rejected by all. **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725 (8th Cir. 1964), **reversing on other grounds but affirming on the issue at bar**, 221 F. Supp. 15 (E. D. Mo. 1963); **Farmington Dowel Prods. Co.**

[7] As pointed out at pp. 88-89, *supra*, the very language of the 1959 Act demonstrates Congress' continued understanding that the FTC is *not* the United States.

v. Forster Mfg. Co., 223 F. Supp. 967 (D. Maine 1963); **Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.**, 223 F. Supp. 712 (E. D. Tenn. 1963). Those secondary authorities which have specifically considered § 5 (b) apart from § 5 (a) concur. Butler 42-47; 1961 CCH Trade Reg. Rep., ¶ 9157. Thus, the court below stands totally alone in its decision. By the weight of all authority, it is clear that § 5 (b) of the Clayton Act does not, and was not intended to, apply to FTC proceedings.

IV. The Policy Considerations Which Governed the Decision Below Cannot Properly Be Resolved by the Courts.

The essence of the decision below is the argument that, with "increased powers," the "expanded" FTC proceedings have gained general acceptance, and should now be regarded as sufficiently judicial in nature that they should now be treated by the courts as "suits in equity" or "civil proceedings," and FTC orders should now be treated as "judgments or decrees." The argument is invalid, for FTC proceedings are very different from judicial proceedings, and are permitted only because they have very different consequences. See pp. 10-13, 68-73 *supra*. But the argument is more than invalid; it exceeds the bounds of judicial discretion. Congress has drawn the statute to exclude FTC proceedings unequivocally. "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." **62 Cases of Jam v. United States**, 340 U. S. 593, 600 (1951).

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose

> that it should have been made more comprehensive. . . . For the ultimate question is what has Congress commanded . . . Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'" **Addison v. Holly Hill Fruit Prods.**, 322 U. S. 607, 617-18 (1944).

In substance, the court below simply decided that it "seem[s] logical" to toll the statute of limitations for FTC proceedings (R. 80). But, as this Court wisely said in **United States v. Cooper Corp.**, 312 U. S. 600, 606 (1941): "[I]t is not for the courts to indulge in the business of policy making in the field of anti-trust legislation."

The conflicting interests which lurk in the background of this case are peculiarly within the competence of Congress to resolve. Should private treble-damage claimants be encouraged to ferret out violations of the antitrust laws, and thereby serve as an ancillary arm of enforcement? If so, as Congress apparently decided in 1890, they should not be invited to "sit around and wait until the Government has developed a case, and then bring suit for triple damages, . . . based on the work that the Government has done" (Rep. Michener, p. 79, *supra*). Or should the "ancillary enforcement" theory be subordinated in whole or in part to other interests, or abandoned entirely? If it is to be abandoned, then the treble-damage remedy would serve a purely punitive purpose; in that event, would it be desirable to eliminate the need for proof of liability in most treble-damage cases, by admitting in evidence orders of the FTC and other agencies as well as the courts?

Congress has already answered these questions. In 1890, the "ancillary enforcement" theory held sway, and apparently not even United States criminal proceedings tolled the statute of limitations, or resulted in admissible judgments. In 1914, Congress compromised these in-

terests, and adjusted the statute to provide that judicial—but not administrative—proceedings would pave the way for treble-damage claimants. In 1955, with full knowledge of the experience gained in the previous 65 years, Congress deliberately re-enacted the statute with no relevant change.

Thus, from the very beginning, Congress has deliberately refused to give to administrative proceedings the effects which the lower court would give. If this Court should decide that the time has come to overrule the decision of Congress, what would be the consequences? Would the new rule require (as a matter of constitutional law, or of legislative choice) a tightening of administrative procedures? See pp. 68-73, *supra*. And would that tightening unduly hamper the activities of the administrative agencies? Should these questions be answered differently, when applied to the ICC, the FCC, the CAB, or the Federal Reserve Board, instead of the FTC? Or should the new rule apply to only some of those agencies?

> "Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, . . . these and many other subtle factors must influence legislative choice. . . . The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all . . . matters within legislative competence.". **Tigner v. Texas**, 310 U. S. 141, 149 (1940).

These are questions of policy, which only Congress can resolve. This Court cannot pick and choose, or make the delicate adjustments which are the essence of the legislative process.

An instructive analogy is afforded by **United States v. Cooper Corp.**, 312 U. S. 600 (1941), where this Court was

called upon to decide whether the federal government was a "person" who could sue for treble damages under the Sherman Act. There, as here, the statutory language, the legislative history, the supplemental legislation, and the universally accepted practice for decades clearly established a negative answer. But there, far more than here, the changing circumstances called for new relief. With the general expansion of government, and particularly with the passage of one World War and the advent of another, the government had become "a purchaser of enormous quantities of material and supplies." 312 U. S. at 614. It was manifestly unjust to withhold from the government an opportunity to recoup its losses from antitrust violations.

But this Court resisted the temptation to "engraft on [the] statute additions which we think the legislature might or should have made." 312 U. S. at 605. The statute was left as Congress wrote it.

The good judgment and restraint of this Court was vindicated fourteen years later, when Congress created a damage remedy for the sovereign, after extended study of the many relevant considerations and ramifications. In so doing, Congress compromised conflicting interests, and made policy choices, in ways not available to the courts. Congress, in its wisdom, gave the government a claim for single (not treble) damages, and explicitly provided that the government damage suit should not result in a judgment admissible as prima facie evidence, and should not toll the statute of limitations. See pp. 80-81, *supra*.

In short, Congress has resolved the conflicting interests which underlie this case. If further adjustments of those interests are needed, only the legislature has the power to make the requisite adjustments and compromises. If it could be said that "any amelioration is required it is now a matter for Congress, not this Court." **Flora v. United States**, 357 U. S. 63, 76 (1958), **aff'd on rehearing**, 362 U. S. 145 (1960).

CONCLUSION.

The tolling provision of the Clayton Act was passed over half a century ago and has undergone no substantive revision since that time. The decision below, upsetting over 50 years of settled law, is not supported by a single authority, either judicial or secondary (except for one withdrawn and repudiated opinion). There is not the slightest hint in the legislative history of this or any other act that Congress ever intended that FTC proceedings should toll the statute of limitations. If such a revision in the antitrust laws is now to be made, it should be accomplished by legislative action, not judicial invention. For the foregoing reasons, it is urged that the decision of the court below be reversed.

Respectfully submitted,

LEWIS C. GREEN,
ALAN G. KIMBRELL,
GREEN, HENNINGS, HENRY, EVANS & ARNOLD,
1530 Boatmen's Bank Building,
St. Louis 2, Missouri,
CE. 1-4181,
Attorneys for Reynolds Metals Company, Amicus Curiae.

Of Counsel:
GUSTAV B. MARGRAF,
W. TOBIN LENNON,
Reynolds Metals Company,
Reynolds Metals Building,
Richmond 18, Virginia.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner-Defendant,

vs.

NEW JERSEY WOOD FINISHING COMPANY,
Respondent-Plaintiff.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER-DEFENDANT

SIDNEY P. HOWELL, JR.,
230 Park Avenue,
New York 17, New York,

CHARLES C. TRELEASE,
744 Broad Street,
Newark 2, New Jersey,
Attorneys for Petitioner-Defendant.

PAUL J. QUINN
EDWIN E. MCAMIS,
REGAN GOLDFARB POWELL & QUINN,
New York, New York,

THOMAS J. LYONS,
St. Paul, Minnesota,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner-Defendant,

against

NEW JERSEY WOOD FINISHING COMPANY,
Respondent-Plaintiff.

BRIEF FOR PETITIONER-DEFENDANT

Preliminary Statement

Presented for review is the judgment of the United States Court of Appeals for the Third Circuit, affirming in all material respects an order of the New Jersey District Court (Augelli, D. J.) denying the motion of petitioner-defendant Minnesota Mining and Manufacturing Company (hereafter "3M") to dismiss the complaint in this private antitrust action as barred by the statute of limitations, section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. §15b.

Judge Augelli's opinion (reported at 216 F. Supp. 507) and the order entered April 19, 1963, thereon appear in the Transcript of Record here at pages R. 58a-67a. The Third Circuit unanimously affirmed in an opinion by Judge McLaughlin printed at R. 69-92 and reported at 332 F. 2d 346. The judgment of affirmance was filed May 20, 1964 (R. 92-3).

This Court's jurisdiction derives from 28 U.S.C. §1254(1) by reason of its grant on October 19, 1964 of 3M's unopposed petition for a writ of certiorari, filed July 17, 1964, which, among other things, cited the clear conflict of the decisions below with the prior rulings of the Eighth Circuit in *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F. 2d 725 (1964), aff'g on the point at issue 221 F. Supp. 15 (E.D. Mo., 1963), and of the District Courts in *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 223 F. Supp. 712 (E.D. Tenn., 1963) and *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 223 F. Supp. 967 (D. Me., 1963).

The Court's grant of certiorari included an invitation to the Solicitor General to file a brief expressing the views of the United States (R. 94). We also understand that counsel for the appellee in *Highland Supply* seeks leave to file a brief *amicus*.

Constitutional Provision and Statutes Involved

The constitutional provision involved is the due process clause of the Fifth Amendment to the Constitution of the United States: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

The statutory provisions principally involved are Sections 4B and 5 of the Clayton Act. Enacted in 1955, Section 4B, 69 Stat. 283, 15 U.S.C. §15b provides, in relevant part, that:

> "Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued."

Section 5 of the Clayton Act, 69 Stat. 283, 15 U.S.C. §16, in its present form (and as amended in 1955 to take

account of the enactment of Section 4B), reads, insofar as pertinent, as follows:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *.
>
> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Section 5 from its original enactment in 1914 (38 Stat. 731) and until 1955, read as follows:

> "A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the

> United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This Section shall not apply to consent judgments or decrees entered before any testimony has been taken: * * *
>
> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Finally—and only because of the decision of the Court of Appeals below and without conceding the provision to be in any way applicable—we quote Section 11(g) of the Clayton Act as added in 1959, 73 Stat. 243, 15 U.S.C. §21(g):

> "(g) Any order issued under subsection (b) of this section shall become final * * *
>
> (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time * * *."

Questions Presented

The fundamental issue on this appeal is whether the four-year limitation upon private treble damage actions is tolled during pendency of a Federal Trade Commission proceeding. More than five years elapsed between the

date of the acquisition of which plaintiff complains and the date this action was commenced and, consequently, both sides accept the fact that the complaint insofar as it is based on this acquisition is not timely unless the statute of limitations was tolled. Accurate comprehension of the Clayton Act's tolling provisions, however, depends upon concurrent analysis of Section 5's prima facie evidence provision. Thus, disposition of the issues raised on this appeal requires an answer to the broader question whether administrative proceedings generally were intended by Congress to have the extraordinary effects which Section 5 of the Clayton Act, as originally adopted in 1914, accorded to "suits" and "proceedings in equity" by "the United States."

That basic issue, plus a question concerning the extent of tolling, if any, were formulated in our certiorari petition in three separate but related questions, as follows:

1. Is a Federal Trade Commission proceeding a "civil or criminal proceeding * * * instituted by the United States" within the meaning of Section 5(b) of the Clayton Act, 15 U.S.C. §16(b)?

2. Is an FTC order to cease and desist the full legal equivalent of a "final judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States" within the meaning of Section 5(a) of the Clayton Act, 15 U.S.C. §16(a)?

3. Does an FTC complaint which alleges that a series of vertical and horizontal acquisitions in the years 1952 to 1956 may substantially lessen competition in violation of Section 7 of the Clayton Act, but alleges no violation of the Sherman Act, sufficiently "complain of" Sherman Act matters to suspend the statute of limitations otherwise applicable to a private treble damage claim that the

final acquisition in August of 1956 was alone the product of a conspiracy and an attempt to monopolize forbidden by Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2?

Both Judge Augelli's opinion (R. 58a-65a; also 216 F. Supp. 507) and that of the Court of Appeals (R. 69-92; also 332 F. 2d 346) answered each of the questions presented in the affirmative, although the uniformity in result was achieved by way of markedly different routes. A negative answer to any of the three will require reversal or drastic modification of the decisions of the lower courts.*

Statement of the Case

The Parties: Plaintiff New Jersey Wood Finishing Company (hereafter "New Jersey Wood"), a New Jersey corporation with its principal place of business at Woodbridge, New Jersey, is engaged in the manufacture of electrical insulation materials, some of which it sells to independent distributors who, in turn, sell to wire and cable manufacturers and other fabricators or consumers of such materials.

Defendant 3M is a Delaware corporation with its principal place of business at St. Paul, Minnesota. A highly diversified company, 3M, through a division formerly incorporated as Irvington Varnish and Insulator Company, also produces electrical insulation materials at Freehold, New Jersey, for sale to others.

The other defendant below, Essex Wire Corporation (hereafter "Essex"), a Michigan corporation, is a substantial consumer of electrical insulation materials. Until

* The third question is similar, if not identical, to that on which this Court granted certiorari in *Leh* v. *General Petroleum Corp.*, No. 348, —— U. S. ——, 13 L. Ed. 2d 85, on the same day as the grant here. We understand the Court expects *Leh* to be argued with this case.

August, 1956, Essex owned and operated Insulation and Wires, Inc. (hereafter "IWI") which, through various branch offices, distributes electrical insulation materials. Although originally named as a defendant, IWI was dropped in the amended complaint and, like Essex, did not join the appeal to the Third Circuit and is not presently before this Court.

The Proceedings Below: New Jersey Wood's original complaint filed November 20, 1961 (R. 5a-9a), sought treble damages and other relief for alleged violations of both Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§1, 2, and of Section 7 of the amended Clayton Act, 64 Stat. 1125, 15 U.S.C. §18.

Inasmuch as the action had been commenced more than four years after 3M's acquisition of the IWI assets, 3M deferred answering the complaint by stipulation and, in addition to other relief not pertinent here, moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint or, alternatively under Rule 56(b), for summary judgment thereon on the ground that the action was barred (R. 11a-13a).

During pendency of that motion, New Jersey Wood filed an amended complaint (R. 48a-55a). While both the original complaint and the amended complaint are therefore included in the record, plaintiff's theories—and, hence, the controlling legal questions—are common to both pleadings. Judge Augelli on the motion treated with the amended complaint throughout as did the Court of Appeals (R. 72).

The Amended Complaint: Since plaintiff relied upon the same claims of statutory violation in respect to defendant 3M in both its original and amended complaints, the principal difference between the two—other than the

greater particularity of the latter's allegations against Essex—is that in the amended complaint the Section 7 claim was recast as a separate count. Compare R. 5a-9a with R. 48a-54a.

After certain jurisdictional facts are recited and the parties identified, Paragraph 5 relates that "in or about August, 1956" 3M acquired from Essex the principal assets of IWI "upon which the plaintiff had continuously, primarily and successfully relied for the sale, resale and distribution of plaintiff's products throughout the United States" (R. 49a).

Paragraph 9 alleges generally that "Beginning in or about August, 1956 and continuing until the date of the filing of this complaint, defendants have unlawfully contracted, combined and conspired to restrain trade in the manufacture, sale and distribution of electrical insulation products" in violation of Section 1 of the Sherman Act (R. 50a).

Paragraph 11 (R. 51a) sets forth the overt acts alleged to have been committed in furtherance of stated purposes (Par. 10) of the asserted unlawful contracts, combinations and conspiracies. Again, the first such act is alleged to have been the acquisition by 3M from Essex of the principal assets of IWI in August, 1956. Subparagraph (b) then acknowledges that, in September, 1956, 3M advised plaintiff that IWI would cease distribution of its products as of January, 1957. Thus, it is apparent from the face of the amended complaint that plaintiff's conspiracy cause of action based on Sherman Act, Section 1, arose in September, 1956, or, at the latest, in January, 1957, in either event clearly antedating the filing of this action in November, 1961, by more than four years.

Subparagraphs (c) through (i) of paragraph 11 deal with various activities of Essex Wire in the years 1956 through 1961 that purportedly flowed from its original

conspiracy with 3M formulated at the time of the latter's purchase of the IWI assets in 1956. Subparagraph (j) alleges that, pursuant to the conspiracy, 3M began—again commencing with the IWI acquisition in 1956—to purchase its requirements of magnet wire from Essex. Subparagraph (k) then claims that, in 1961, 3M resold the IWI assets to Essex, again "pursuant to the conspiracy".

Paragraph 12 (R. 54a) charges that, by the conspiracy already alleged, the defendants attempted to monopolize interstate trade in electrical insulation products in violation of Section 2 of the Sherman Act. The First Count's remaining allegations (Pars. 13-15; R. 54a) relate to plaintiff's damages and to the pendency in the period June, 1960, to August, 1961, of the FTC proceeding against 3M (but not Essex) "concerning substantially identical subject matter" as that here alleged.

Plaintiff's Second Count incorporates all prior allegations as to 3M's acquisition of IWI in August, 1956, and then alleges that the effect of that acquisition was substantially to lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act to plaintiff's damage (R. 54a-55a).

The Decisions Below: By order filed April 15, 1963 *nunc pro tunc* as of February 11, 1963 (R. 56a), the District Court dismissed as time barred so much of the claim against Essex as was based on Section 7 of the Clayton Act but permitted plaintiff to restate its Sherman Act claim against Essex in terms of overt acts committed within the four years immediately preceding the filing of the original complaint.

Thereafter, Judge Augelli rendered his opinion of April 19, 1963 (R. 58a-65a) denying 3M's motion to dismiss on the ground that the Clayton Acts four-year statute of limitations had been tolled under Section 5(b) of that Act

with respect to all alleged violations of *both* the Clayton and the Sherman Acts because of the pendency from June, 1960, to August, 1961 of a Federal Trade Commission proceeding against 3M. As noted, the Third Circuit unanimously affirmed despite the express repudiation of Judge Augelli's views by the Eighth Circuit and two other district courts in the interim.

The FTC Proceeding: The FTC's complaint in Docket 7973 (R. 15a-26a) charged that, by six transactions in the years 1952 through 1956, 3M, already the leading manufacturer of electrical insulation tape, became a dominant producer of seven other electrical insulation product lines and that 3M's subsequent acquisition in 1956 of *two* of the three largest distributors of these products (Prehler *and* IWI) might have the effect of actually *or* potentially lessening competition and tending to create a monopoly in various aspects of that commerce. To the FTC, therefore, 3M's "acquisitions, acts and practices," violated Section 7 of the Clayton Act, as amended (Par. 6, R. 26a).

That FTC complaint, in contrast to the pleading at bar, invoked no antitrust law other than Section 7 and, except for a single descriptive reference (R. 20a), did not so much as mention Essex Wire. Apart from conventional Section 7 market share statistical comparisons, the FTC complaint did not advert to any actual "acts or practices" occurring after the 1956 Prehler and IWI acquisitions but confined its scope to types of prospective or potential effects that are both appropriate to, and typical of, Clayton Act proceedings.

This proceeding terminated in a consent order (R. 29a; 47a), entered before any testimony had been taken (Par. 6; R. 30a), calling upon 3M to divest itself only of the IWI assets. Thus, even if the order had been obtained in court by the Attorney General, it would come under

§5(a)'s *proviso* making such consent orders unavailable as prima facie evidence in private, treble damage actions.

The Rationale of the Courts Below: On this record, the District Court held (R. 61a-65a) that:

1. Since Section 5(b) is "separate and apart" from Section 5(a), the only question is what constitutes "pendency" of a "proceeding" without reference to whether that proceeding terminated "on consent" or resulted in a "final judgment or decree"; and

2. An FTC proceeding based on Section 7 of the Clayton Act is "an action under the antitrust laws" brought "by the United States" as to which Congress intended that private plaintiffs should have the benefits—not only of a successful prosecution—but also of "facts" developed during the FTC's investigation.

Judge McLaughlin, speaking for the Third Circuit in affirming the District Court, held that:

1. Between 1914 and 1959, FTC orders and proceedings lacked Section 5 attributes only because the orders emanating from the FTC's Clayton Act proceedings did not become final unless and until affirmed by a Court of Appeals; and

2. FTC proceedings under the Clayton Act and the resulting orders therein have since 1959—and since then solely by reason of the Finality Act amendments to Section 11—enjoyed all the efficacy of Justice Department prosecutions and actions and the judgments and decrees therein and, therefore, can constitute prima facie evidence under §5(a) and, consequently, tolls limitations under §5(b) in the same manner and to the same extent as court proceedings.

Both courts below then ruled, tersely but on similar grounds, that FTC charges that an acquisition "may substantially lessen" competition in violation of Section 7 of the Clayton Act sufficiently "complains of" conduct prohibited by the Sherman Act so as to suspend limitations otherwise applicable to private Sherman Act "rights of action".

Unless reversed, these rulings will subject 3M to a highly attenuated treble damage action instituted by a plaintiff that slept on its rights, if any, more than five years after being formally advised of the transaction by 3M of which complaint is made and several months after 3M reconveyed the IWI assets in question, a transaction which, while restoring the *status quo ante*, at the same time handicaps 3M's defense of this case since relevant records and personnel passed from its control.

Summary of Argument

I. An FTC proceeding is not—and never was contemplated by Congress to be—"a civil or criminal proceeding" brought "by (or on behalf of) the United States." Nothing done either in amending Section 5 in 1955 or in amending Section 11 in 1959 brought FTC proceedings within the ambit of either paragraph of Section 5. Apart from the Third Circuit's affirmance, no reported case, either prior to or since the District Court opinion below, has held to the contrary. On the other hand, all such cases have uniformly—and properly—held that FTC proceedings neither serve to toll limitations nor result in admissible prima facie evidence.

II. Statutory construction, legislative history and judicial precedent aside, the decisions below represent a singularly ill-considered and unwarranted intrusion upon the Congressional province and should, therefore, be re-

versed out of doubt as to (a) the constitutionality of Section 5(a) as construed by the Court of Appeals below; (b) the alternative construction of the District Court that would divorce or compartmentalize Section 5's two subsections out of context; and (c) the wisdom of either court in injecting a novel proposition of antitrust enforcement policy into treble damage litigation after fifty years acquiescence by the judiciary, Congress and the executive as well as by the private bar in the prior concept.

III. Tolling should, in any event, be strictly construed as in derogation of the declared Congressional interest in laying controversy to rest. It is not enough that the FTC's complaint referred to *a* fact later realleged in the private complaint: there must be an actual, purposeful identity of subject matter "complained of." A Section 7 charge of a prospective lessening of competition or a tendency to monopoly as a result of a series of horizontal and vertical acquisitions ending in August, 1956, is wholly different from a charge that, in 1956, a conspiracy was formed to injure a competitor and that the first overt act in furtherance thereof was to consummate the last of that series of acquisitions and that the first impact upon plaintiff occurred in January, 1957. Hence, limitations respecting plaintiff's Sherman Act claims were not tolled and those claims are, in any event, barred.

I

A proceeding by the Federal Trade Commission does not toll the Statute of Limitations provided in the amended Clayton Act, Section 4B.

In 1914, Congress described the document to which it accorded the status of prima facie evidence in the first paragraph of Section 5—§5(a) since 1955—as "a final judgment or decree" rendered in a "criminal prosecution" or a "suit or proceeding in equity" brought by or on behalf of the "United States". This language, we submit, simply—and deliberately—excluded administrative proceedings from Section 5 altogether.

While that first paragraph is not directly involved on this appeal, the answer to the question of tolling as presented here can also be obtained by thoroughly considering Congress' purposes in enacting both paragraphs of Section 5. Thus, we inquire, next, whether Congress in 1914 did intend to have Section 5 applied to administrative proceedings in any way and, if not, then whether any amendment since 1914 has revised the Congressional purpose in this respect.

We also show that, during the forty-nine years between adoption of the Clayton Act and Judge Augelli's decision, no court so much as intimated, much less ruled, that applicable limitations were tolled during pendency of an FTC proceeding; on the other hand, several courts had emphatically declared that an order emanating from FTC proceedings could not constitute prima facie evidence. Commentators, therefore, uniformly considered that FTC proceedings could not toll since, clearly if the purpose in tolling limitations was to permit a private plaintiff to await the outcome of government litigation in order to be able to use the "judgment or decree"—if a

favorable one eventuated—in his own action, it made no sense to toll limitations during the pendency of an FTC proceeding from which, because it is an administrative rather than a judicial proceeding, no admissible order could eventuate.

A. An FTC proceeding is neither a "criminal prosecution" nor a "suit or proceeding in equity."

Because the FTC has no power to punish or fix liability for past conduct, an FTC proceeding is certainly not a "criminal prosecution." *FTC* v. *Ruberoid,* 343 U. S. 470, 473 (1951); *FTC* v. *Cement Institute,* 333 U. S. 683, 705-6 (1948).

Nor is an FTC proceeding a "suit or proceeding in equity" as originally stipulated in both paragraphs of Section 5:

> "The Commission exercises only the administrative functions delegated to it by the act, not judicial powers * * *. It has not been delegated the authority of a court of equity." *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U. S. 619, 623 (1927).

The view taken in *Kodak* has been generally followed. See, *e.g., Arrow-Hart & Hegeman Electric Co.* v. *FTC,* 291 U. S. 587 (1934), and *U. S.* v. *The Philadelphia National Bank,* 374 U. S. 321, 339 n. 17 (1963). Also consider the statement that FTC orders "are administrative orders as distinguished from judicial decrees" in *National Candy Co.* v. *FTC,* 104 F. 2d 999, 1004 (7th Cir., 1939) cert. den. 308 U. S. 610 (1939).

The antitrust bar has operated with the same understanding:

> "The rise in stature and importance of administrative agencies in recent years has, to be sure, caused changing notions as to the status of bureaus such as the FTC. It seems inconceivable, however, that in 1914, when the Commission was established and when this expression [*i.e.*, "suit or proceeding in equity"] was used in the enactment of the Clayton Act, any member of the Congress equated the administrative functions to be performed by the FTC with judicial proceedings. At that time, careful distinctions were preserved in federal courts between their jurisdiction in law actions and suits in equity and it stands to reason that the expression 'suit or proceeding in equity' was used solely to distinguish between court actions, on the law or equity side of the court docket." Butler, *Application and Constitutionality of Tolling of Statute of Limitations Provisions of Section 5, Clayton Act, in Cases of Dual Enforcement Jurisdiction*, 8 American Bar Association, Antitrust Section Proceedings 42, 46 (1956).

It is self-evident that the words "suit or proceeding in equity" in Section 5 and the words "proceedings in equity" in Section 15 of the Clayton Act, 38 Stat. 736, 15 U.S.C. §25, precisely parallel the language of Sections 4 and 9 of the Sherman Act, 26 Stat. 209, 28 Stat. 570, 15 U.S.C., §§4, 9, and that Congress therefore intended them to mean just what they meant in that Act which had long provided that "* * * it shall be the duty of the several district [now 'United States'] attorneys * * * to institute proceedings in equity to prevent and restrain such violations." Thus, "the phraseology of the Sherman Act makes indelibly clear the kind of suits that were meant." (Butler, *op. cit.*, p. 46.)

In marked contrast, Section 11(b) of the Clayton Act, 38 Stat. 734, 15 U.S.C. §21(b), provides for administrative enforcement of certain sections of that Act upon a "complaint" which may result in an "order", rather than either a judgment or a decree in equity. This formulation, drafted in 1914, has remained unchanged.

Since Commission proceedings result in administrative "orders" (a term nowhere used in Section 5) which are to be distinguished from judicial "decrees", *National Candy Co.* v. *FTC*, *supra*, and Section 5 speaks of "any civil * * * proceeding"—originally "any suit or proceeding in equity"—in specific relation to a "final judgment or decree," it is apparent that Commission proceedings do not come within the language of Section 5's first paragraph.

Judge McLaughlin reasoned (R. 84) that the "proceeding in equity" requirement was satisfied by the provisions for review in the Court of Appeals which, sitting as a court of equity, conducted a "proceeding in equity" in reviewing FTC determinations.* Judge McLaughlin thus must agree that, before FTC orders became "final" in 1959, only those FTC proceedings which were appealed could have constituted "proceedings in equity". The anomaly of such a reading becomes evident with the realization that no one could know whether "pendency" of an FTC proceeding had tolled the statute of limitations until the proceeding was completed and an appeal prosecuted. Since appellate review might take place years later under pre-1959 procedure, the statute might be tolled indefinitely.

* The Third Circuit's reliance on *Niehoff* v. *FTC*, 241 F. 2d 37, 42 (7th Cir., 1957), for this view is clearly misplaced since *Niehoff* was later reversed by this Court, 355 U. S. 411 (1958), on the holding that the FTC's determination "should not be overturned in the absence of a patent abuse of discretion" (p. 414), a holding which, of course, repudiates the notion that a Court of Appeals on review of an agency determination sits as a court of equity.

Judge McLaughlin's view that FTC proceedings themselves became "proceedings in equity" in 1959 when FTC orders became "final" simply confuses the issue: the real objection to classifying an FTC proceeding as a "proceeding in equity" arises from the inherent nature and quality of the proceeding and not from pre-1959 procedural differentiations in enforcement of FTC and Justice Department sanctions. See the discussion of the 1959 amendment at pp. 41-44 and Point II(A), *infra*.

B. An FTC proceeding is not instituted "by the United States".

Since enactment in 1914, Section 5 has stipulated that, to toll the statute of limitations, the civil proceeding in question must be one "instituted *by* the United States."*

In the first and leading case on the point, *Proper* v. *John Bene & Sons*, 295 Fed. 729, 732 (E.D. N.Y., 1923), the court ruled that, "strictly speaking", an FTC proceeding is not brought "by or on behalf of the United States". Cf. *FTC* v. *Nash-Finch Co.*, 288 F. 2d 407 (D.C. Cir., 1961). And it has been specifically held that the FTC and the United States are separate parties, *e.g.*, *U. S.* v. *Aluminum Company of America*, 1 F.R.D. 48 (S.D. N.Y., 1938), clearly the traditional view of the relationship

* A similar requirement in the prima facie evidence provision provides that the proceeding must be "by *or on behalf of* the United States," a curiosity of draftsmanship upon which no authority seems to have remarked although the Senate Committee struck the "on behalf of" language from the tolling provision as passed by the House. Sen. Rep. 698, 63d Cong., 2d Sess., pp. 57-59 (1914). Of course, the tolling provision is, if anything, more restrictive in this respect. Some awareness that the distinction may be significant appears in Judge McLaughlin's constant characterization of FTC action as being "on behalf of the United States" rather than "by the United States" (R. 79; 81). This reiterated slip, perhaps unintentional, in some measure belies the consistency of the Court's argument.

between the United States and its agencies which finds expression in many statutes* and judicial decisions.

It is the Department of Justice which is normally thought to bring actions "by the United States" and any agency which can sue or be sued in its own right is not "the United States." Indeed, instances in which the United States and an agency have appeared in actions as separate parties and presented opposing views are common. See *e.g., Henderson* v. *United States,* 339 U. S. 816 (1950); *United States* v. *Interstate Commerce Commission,* 337 U. S. 426 (1949). By the same token, when the "United States" refused to argue a case on behalf of the FTC because of a conflict in the views of the Commission and the Solicitor General, the Commission appeared on its own behalf and argued its own views. *Standard Oil Co.* v. *FTC,* 340 U. S. 231 (1951). See Stern, *"Inconsistency" in Government Litigation,* 64 Harv. L. Rev. 759, 768, note 31 (1951).

On the other hand, the Commission has clearly regarded itself as distinct from the "United States." Thus, the FTC contended in *FTC* v. *Nash-Finch Co., supra,* that the action should be dismissed for failure to join the "United States" as an indispensable party. The Circuit Court—apparently accepting the distinction between the agency and United States as fundamental—held that "the United States" was not indispensable because no action "by the United States" was under attack; instead "action of the Commission alone is now challenged." See 288 F. 2d at 410.

Other aspects of antitrust enforcement clearly depend on observance of and adherence to this basic difference. For instance, Section 11(l) of the Clayton Act, 15 U.S.C.

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* *E.g.,* Sections 2403 and 2408 of Title 28, U.S.C., 62 Stat. 971, 972, both treat with the "United States" as a party to judicial proceedings. Had Congress intended to include agencies such as the FTC within the term "United States", the words "of any agency" in Section 2403 and "any department or agency" in Section 2408 would have been superfluous.

§21(l), provides penalties upon proof of a violation of an FTC order to be recovered in a civil action brought "by the United States." For all that appears, no one—including the Federal Trade Commission—has ever entertained the slightest doubt that these words, identical to those in Section 5(b) regarding tolling, require an action in court by the Justice Department. See, for example, 5 CCH Trade Reg. Rep'r., Pars. 50,118; 50,126; 50,185; 50,193. The Commission has always similarly interpreted the equivalent provision of the FTC Act after its amendment by the Wheeler-Lea Act in 1938, 52 Stat. 111, 114; 15 U. S. C. §45(l).*

Surely the conclusion that the United States and the Federal Trade Commission are different parties is inescapable in view of Section 11(e) of the Clayton Act, 38 Stat. 734, 15 U.S.C. §21(e), which expressly provides that no order of the Federal Trade Commission shall absolve any person from liability under the antitrust laws. The equivalent provision in Section 5(e) of the Federal Trade Commission Act, 15 U.S.C. §45(e), was the principal basis for the holding in *U. S.* v. *Charles Pfizer & Co.*, 205 F. Supp. 94, 97 (S.D. N.Y., 1962), that the United States could proceed with a Sherman Act indictment against certain defendants which were also respondents in a pending FTC proceeding brought under Section 5 of the Federal Trade Commission Act but based on similar or identical

* Note the Commission's procedures in certifying violations and requesting the Attorney General to sue for the civil penalty as elaborated by an FTC representative at "Finality of Clayton Act Orders", Hearings Before Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives on H.R. 432 etc., 86th Cong., 1st Sess., May 27-May 28, 1959, Serial No. 3, pp. 21-22 (hereafter "the 1959 Hearings"). Note, also, that it is the "United States" which, when injured in *its* business or property by an antitrust violation, sues to recover damages "by *it* sustained." Clayton Act, §4A; 69 Stat. 283, 15 U.S.C., §15a. Again, it has never been suggested that the FTC—or any arm or agency other than the Attorney General—could prosecute such suits.

facts, although the hearing examiner had already recommended that the FTC complaint be dismissed. Judge Ryan pointed out that, even if the Commission ultimately exonerated the defendants, the agency's findings would not bind the United States and would not be admissible at trial. Accord: *McKesson and Robbins, Inc.* v. *Charles Pfizer & Co., Inc.*, ___ F. Supp. ___ (E.D. Pa., Nov. 4, 1964); *Matter of Columbia Broadcasting System, Inc.*, ___ F. Supp. ___ notes 7 and 8 (S.D.N.Y., Nov. 10, 1964); Cf. *FTC* v. *Cement Institute*, 333 U. S. 683, 694-5 (1948).

Whatever its origin, Section 11(c), common since 1914 to both the Clayton and FTC Acts, demonstrates that Congress has consistently and clearly distinguished agency proceedings from court actions and just never intended to have Section 5 apply to agency proceedings or to have the United States bound in antitrust suits by agency determinations be it the FTC or any of the several other agencies vested by Congress with an antitrust competence. Cf. Section 11(a), 15 U.S.C., §21(a).

To counter these considerations, Judge McLaughlin again relied on the 1959 act making FTC Clayton Act orders final which, in his view, also erased any need to continue the former distinctions between the United States and the Commission as separate parties. Apart from the fact that there is no logical connection between the finality of FTC orders and the status of FTC determinations as binding upon the United States, such a view ignores the substantive differences in judicial and administrative determinations of fact which both the Department of Justice and private litigants have sought to preserve. See the discussion at Point II(A), *infra*.

Moreover, Judge McLaughlin took no account of §5(a)'s stipulation that a "judgment or decree" in a governmental "civil or criminal proceeding" would be admissible only in cases where that judgment or decree "would

be an estoppel as between the parties thereto."* It may therefore be fairly argued that, if FTC orders do not estop "the United States" per *Pfizer,* etc., the FTC is obviously not "the United States" and, hence, its orders would never be admissible in subsequent private litigation. This, of course, cuts the ground completely from under the Third Circuit's contrary views. See Point II(C), *infra.*

Taken all in all, it therefore seems plain that Section 5, by unambiguous language, excludes FTC proceedings. To this extent the 8th Circuit in *Highland Supply Corp.* v. *Reynolds Metals Co., supra,* 327 F. 2d 725, was well warranted in taking Section 5 at face value and refusing to indulge in a microscopic analysis of its legislative history. Nevertheless, as we now demonstrate, that history gives more than ample substance to the phraseology selected by Congress.

C. 1914 Congressional history demonstrates that Congress did not intend to include FTC proceedings within the scope of Section 5.

When the Clayton Act was debated late in the summer of 1914, Congress had all but completed work on the Federal Trade Commission Act. Nowhere in the legislative history of the Clayton Act, however, is there the slightest indication that an FTC order or proceeding was to be included within the scope of Section 5 (Section 6 as numbered in the drafts discussed in both houses).

First, Congress chose the term "judgment or decree" to describe the document accorded admissibility as prima facie evidence. As pointed out by Butler, page 16, *supra,*

* By the same token, the court below failed to note that Section 5(a) speaks of a "judgment or decree * * * that a *defendant*" has violated the antitrust laws. "Respondent" has, of course, always been the preferred nomenclature in FTC parlance as well as in its Rules of Practice.

the alternative definitions simply distinguished between law and equity actions in a court in conventional legal parlance of the day.* On the other hand, while the term "order" does not appear in Section 5, that is the term Congress selected in Section 11(b) of the Clayton Act to describe the final disposition of an administrative proceeding. Cf. Administrative Procedure Act, §2, 60 Stat. 237, 5 U.S.C. §1001(d).

Second, the floor debates do contain considerable material that manifests a clear Congressional understanding that Section 5 was not to apply to FTC—or any other—administrative proceedings. Thus, during discussions of the effect that FTC orders should have in subsequent proceedings:

> "Mr. Sutherland: * * * So far as the findings of the commission are concerned, I do not think they ought to be evidence anywhere.
>
> "Mr. Crawford: I do not, either.
>
> "Mr. Sutherland: I doubt very much whether we could make them evidence * * *." 51 Cong. Rec. 12789-90 (1914).

Senator Walsh led the fight to sustain the House version making a decree in a suit by the United States *conclusive* rather than prima facie evidence in any subsequent private action against the defendant. His principal argument that a defendant against whom such a decree was introduced had already had his day in court was obviously—and necessarily—premised on the belief that such evidence could emanate only in a judicial pro-

* "Little time need be spent defining a final judgment or decree, since it is generally accepted as the pronouncement of a court of last resort or, if no appeal is taken, the judgment or decree of the trial court." Timberlake, *Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N. Y. U. L. Rev. 991, 994-5 (1961).

ceeding. The defendant, maintained the Senator, "has had an opportunity to try out before a *court, with all the forms of the law,* every question involved in the *lawsuit* • • •. Here the party has had its day in *court.* He has tried every issue and it is simply a question, now that he has it tried, whether he may insist upon a *second trial.*" 51 Cong. Rec. 13851, 13857 (1914).* The same point was made in the House debate by Representative Floyd (who co-authored the bill with Judge Clayton):

> "• • • so far as that decree as between the Government and the corporation is concerned, I do not believe that anyone can question the justice or the right of making it conclusive. Such decree imports absolute verity, binding upon the Government and the party to the suit, both as to findings of fact and questions of law determined in the suit. Does anybody question that? *That is the common rule of law applied to all judgments and decrees of all courts of record.* That is an old doctrine of the law. Then what do we propose in this case? The word 'conclusive' seems to have created confusion in the minds of a great many persons. What are we seeking to do? We are not giving to that decree any element or quality except such as attaches to every other decree. A decree or judgment of a *court of record* imports upon its face *absolute verity.* Such decree is binding upon all parties to the suit, and cannot be attacked collaterally. What we are attempting to do in this case is to apply that decree, with its usual effect, with its usual force, in another suit wherein one of the parties was not a party to the original suit." 51 Cong. Rec. 9489 (1914).

See also the remarks of Representative Scott who employed similar language in advocating the proposal to make Section 5 decrees conclusive:

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* Emphasis in this, and all succeeding quotations, is supplied unless otherwise specified.

> "It seems to me rather inconsistent to say that it would be unfair to conclude the corporation charged with conspiracy by a decree of a *court of equity* and then say it would be fair to conclude an individual who brings a suit for damages by a decree of a *court,* and in a *suit* to which he was not a party * * *. I am inclined to the opinion that if the corporation is brought into a *court of equity* upon a proper bill and by a proper service, and with subject matter over which the *court* has jurisdiction, that probably the findings of fact would be conclusive upon the corporation and would be binding, leaving open only the matter of damages to be submitted to the jury." 51 Cong. Rec. 9492 (1914).

Clearly any understanding that administrative orders —*i.e.,* orders not necessarily the product of a proceeding with "all the forms of the law"—as well as court judgments were to be admissible in a private suit, would have turned Senator Walsh's point to the advantage of the many who questioned the constitutionality of his proposal.

Any thought that the senators were using "court" in a way that might include the Federal Trade Commission was dispelled by Senator Myers of Montana speaking in support of an amendment to the Trade Commission Act that would allow any FTC determination to be tried *de novo* by the court on appeal:

> "The proposed trade commission will not be a court; it will not have judicial powers; it will not necessarily conduct its inquiries according to the rules of court procedure or the rules of evidence or any rules of law. There does not need to be a single member of the commission a lawyer; all may be laymen. To provide that these men shall pass on valuable property rights, which may affect the investments of millions of dollars, without full right

> of recourse by those affected to the courts, to be there passed upon according to law, is, to me, incomprehensible." 51 Cong. Rec. 13106 (1914).

In a somewhat different context, Senator Reed made the same point most succinctly: "The fact is, as everyone knows, that the Trade Commission could not deal with criminal penalties because it is not a court." 51 Cong. Rec. 16154 (1914).

Equally persuasive is the testimony demonstrating that the tolling provision would apply only in the event of governmental judicial proceedings. Again, Representative Floyd to the House:

> "Many combinations have been dissolved under the Sherman law by the decree of the *United States courts*. The proceedings were lengthened out for years, and at the end of the suits they were adjudged by the *courts* to be unlawful combinations, and yet parties who had been injured by the unlawful acts of those corporations were without redress. This proposes to suspend the statute of limitations during the continuation of *such suits* * * *." 51 Cong. Rec. 9164 (1914).

Throughout the debates, the terms used indicated that the speakers thought exclusively in terms of—and, *a fortiori*, intended only—judicial proceedings. Certainly the phraseology employed was and is wholly inapplicable to administrative proceedings.

Thus, Representative Nelson criticized an amendment that would have made a judgment or decree binding upon private plaintiffs as well as upon the government: "Although the independents have never had their day in court, they are absolutely bound by any feeble compromise the *Attorney General* may make." 51 Cong. Rec. 9169 (1914).

Or again, Senator Cummins: "But when the suit is brought, then the *judgment or decree* of the *court* in the suit that has been brought by the government would be prima facie evidence of violation of antitrust law * * *." 51 Cong. Rec. 13850 (1914).

Eventually the Senate Judiciary Committee cut back the evidentiary effect of a Government decree from "conclusive" to "prima facie" expressly on constitutional grounds. Sen. Rep. 698, 63d Cong., 2d Sess., 45 (1914). It is almost inconceivable that those who so successfully opposed making a decree conclusive against a defendant would have failed to add to their constitutional argument by pointing out that such a "conclusive decree" could emanate from the new Trade Commission under the loose procedures that everyone realized it might use and even intended it to use. That this argument is nowhere recorded is at least some evidence that no one supposed that Commission proceedings and orders were in any way involved.

Actually more tangible evidence is also at hand. When an amendment was offered by Senator Bryan to strike the words "in equity" so that the provision would simply read "any suit or proceeding", Senator Reed observed "that would cover any kind of proceeding"; in other words, an argument could possibly then be made that the new language would extend to "proceedings" by administrative agencies. Senator Bryan thereupon withdrew his amendment, 51 Cong. Rec. 13897-8 (1914), and, as we know, the precise, well-recognized phrase "in equity" was retained.

At the same time the Senate added the phrase "criminal prosecution" and Senator Culberson observed that this language would prove sufficiently broad to include all actions by the United States because:

> "There is no suit authorized by any of these statutes *by the United States* except a criminal

prosecution or a suit in equity. The United States does not bring a suit at law for damages." 51 Cong. Rec. 13898 (1914).

Another critical comment by Senator Reed on the limited sanctions at the command of the newly-established Trade Commission indicates that he never imagined that Commission orders could constitute evidence in a subsequent treble damage suit:

> "We thought it would be easy to prove a particular practice and to impose a swift and speedy penalty. We end by taking every penal provision out of the trust sections of this bill. We end by providing a smooth and easy road which may be travelled through the years, until finally a commission shall issue an innocuous, nonenforceable decree, a decree that can be vitalized only by being affirmed by a court. At the conclusion of all the litigation we propose to impose no penalty, levy no fine, send no one to jail and we permit the culprit to preserve his swag!" 51 Cong. Rec. 15867 (1914).

Proponents of the Trade Commission and Clayton Acts as written could have effectively answered that taunt if they had been able to reply that, as a result of their labor, the culprit might well lose his swag and far more because the Commission's order would be admissible as prima facie evidence in a private treble damage action. No one offered this retort, however, even though Senator Reed's complaint was repeatedly echoed by those who believed the Commission should be given power to impose penalties.

The available answer came from Representative Webb who pointed to the advances made by Section 5 and by Section 11 (which gives the FTC jurisdiction over certain Clayton Act violations):

> "Now the value of these two sections is this: That they not only give the individual the right to

sue for treble damages where he pleases, and we not only suspend the statute of limitations if a Government suit is brought against a trust, but we *also* require the Federal Trade Commission to stop these practices and take those guilty of such practices into court.

"But that is not all. Some argue that after the Trade Commission takes jurisdiction that excludes individuals from pursuing those other remedies. The bill further provides:

"No order of the commission or board *or* the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts.

"So you may have three or four distinct remedies, all of which may be invoked at the same time." 51 Cong. Rec. 16274 (1914).

Thus, it quite clearly appears that Representative Webb distinguished a "Government suit"—and "Government" throughout the debates is used synonymously with "the United States"—during which the statute of limitations would be tolled from a Federal Trade Commission proceeding which would have the limited but important effect of stopping unlawful practices in the future. He obviously could have added materially to his point if FTC proceedings were also to toll the statute of limitations.

It is, therefore, palpably plain that Congress concluded its labors on both the Clayton and Trade Commission Acts in 1914 with no articulation by anyone of any idea that Section 5 was to, or should be adapted to, comprehend Commission proceedings as either tolling limitations while pending or resulting in admissible prima facie evidence when litigated to a conclusion, much less both. The only intimation along these lines which did appear was firmly squelched.

However, Judge McLaughlin turned from the obvious, compelling inference with the comments that the legislative history as to the relationship between the two parts of Section 5 is "sparse" and that the question as to whether FTC proceedings were to toll limitations "was not squarely met by the 1914 legislators" (R. 87). If these comments be apt on a reading of the full 1914 record, they are even more pointed in respect to the 1955 amendment of Section 5 and the 1959 debates on the Finality Act. In no case, as we shall demonstrate, did any legislator, senator or representative, or any FTC staff or Justice Department spokesman so much as hint that Section 5 ever had—or should have—anything whatever to do with Trade Commission proceedings much less intimate that the FTC prosecuted (a) civil proceedings (b) by the United States (c) against "defendants" which (d) resulted in a judgment or decree. See *Farmington Dowel Products Co.* v. *Forster Mfg. Co., supra,* 223 F. Supp. 967.

D. Authorities considering Section 5 after 1914 and before its amendment in 1955 uniformly held that FTC proceedings and orders were not included.

Occasions only rarely arose in the next forty years in which courts construing Section 5 as originally enacted were required to distinguish between judicial suits and administrative proceedings. To some degree, those four decades of silence in a most litigious area in which the FTC has certainly been active bespeak at least tacit acceptance of the theory of this appeal. As Justice Frankfurter once remarked, "* * * just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to

exercise it, is equally significant in determining whether such power was actually conferred." *FTC* v. *Bunte Bros.*, 312 U. S. 349, 352 (1941).

When the applicability of Section 5 to FTC orders first arose in *Proper* v. *John Bene & Sons, supra,* the Court refused to admit an FTC order, holding, *inter alia:*

> "* * * (1) That the proceedings before the Federal Trade Commission did not result in a final judgment or decree. (2) There is grave doubt whether the proceedings before the Commission is a proceeding in equity. The Commission itself is rather an investigating body than a judicial tribunal, and its order has no binding effect until it has received the judicial sanction of the Circuit Court of Appeals. (3) Strictly speaking, it would seem that the proceeding is not brought by or on behalf of the United States, inasmuch as it is instituted by the Federal Trade Commission, although it may well be held that this body as a creature of the government may be said to be acting on behalf thereof * * *." 295 Fed. at 732.

While the tangential decision in *International Tag & Salesbook Co.* v. *American Salesbook Co.*, 6 F.R.D. 45 (S.D. N. Y., 1943), is obviously in accord, it remained for Judge Wyzanski to state clearly in *U. S.* v. *United Shoe Machinery Corp.*, 89 F. Supp. 349 (D. Mass., 1950), that FTC orders could not serve as prima facie evidence:

> "The Commission's cease and desist order may in many cases be as drastic as the decree of a District Court, except for the one point that the District Court's decree unlike the Commission's order can be used as prima facie evidence in a treble damage suit" (p. 356).

It also seems a fair inference that Mr. Justice Clark, in discussing Section 5(a)'s scope the following year in

Emich Motors Corp. v. *General Motors Corp.*, 340 U. S. 558 (1951), did not perceive that Congress had intended to bring FTC proceedings within its purview, *viz.*:

> "The intended application and extent of such evidentiary benefits is not revealed by legislative materials, except that they should follow equally from prior criminal prosecutions and equity proceedings by the Government" (p. 568).*

In addition to these judicial pronouncements, prominent text authorities readily—and uniformly—concluded that Section 5 did not extend to Federal Trade Commission proceedings. See, *e.g.*, 2 Toulmin's *Anti-Trust Laws*, p. 118 (1949); Kronstein & Miller, *Regulation of Trade*, p. 1106 (1953). Note, also, the comment of the Commerce Clearing House editors at 2 Trade Reg. Rep'r., ¶9157.

Only one case decided since 1914 throws any doubt on these self-evident conclusions and both Judge Augelli and Judge McLaughlin placed their principal reliance upon the original opinion which the Second Circuit declared "withdrawn" on re-hearing in *Brunswick-Balke-Collender Co.* v. *American Bowling and Billiard Corp.*, 150 F. 2d 69, rev'd. on re-hearing 150 F. 2d 74 (2d Cir., 1945), cert. den. 326 U. S. 757 (1945). There, two members of the court initially decided that, after the 1938 amendment to the FTC Act, an FTC order was final without the entry of an enforcing decree by a Court of Appeals and that such a final order could be admitted as a "final judgment" or "decree" within the meaning of Section 5 of the Clayton Act. On re-hearing, the majority reversed its previous determination and ruled the proffered FTC

* We also venture to presume that "Government"—particularly when capitalized—was intended by Justice Clark as a synonym in this context for the Department of Justice, *i.e.*, the United States, not one of its constituent, but autonomous, agencies.

order had been properly excluded from evidence after all, with the following explanation:

> "In our [original] opinion, we treated the 1938 amendment as to the effectiveness of the Commission's order as an amendment of the Clayton Act * * * In fact, it merely amended the Federal Trade Commission Act * * * We must, therefore, hold that the order of the Federal Trade Commission was correctly excluded. Cf. *Proper* v. *John Bene & Sons.*" 150 F. 2d at 74.

Judge Evans, dissenting from the Court's original determination, had, however, emphasized other requirements of Section 5 with which, in his view at least, an FTC proceeding did not comply and concluded that "* * * it seems tolerably plain to me that the quoted portion of Section 5 of the Clayton Act does not apply to an order of the Federal Trade Commission." 150 F. 2d at 73. Neither in its original opinion nor in its opinion on re-hearing did the majority analyze or consider the distinctions—apart from lack of finality of FTC Clayton Act orders—which to Judge Evans, as well as to most others, indicated that Section 5 did not include FTC proceedings and orders. Certainly the ultimate determination was correct (it was, of course, the final determination on which certiorari was denied) and perhaps not too much weight should be attached to the reason assigned by the court for reversing itself in a case so poorly presented that the Court did not at first grasp the statutory distinctions in the finality of FTC Act and Clayton Act orders.

Certainly the Second Circuit now seems to agree that administrative findings are too untrustworthy to serve as evidence of liability. In *Wright* v. *Carter Products*, 244 F. 2d 53 (2d Cir., 1957), a tort action for personal

injuries allegedly caused by defendant's deodorant, plaintiff attempted to introduce an FTC finding that "Arrid" had caused and might cause injury to a number of people. In rejecting this offer of proof, the Court cited with approval both the *Proper* case and *Brunswick-Balke* as revised on rehearing:

> "Since this finding was made in a controversy between different parties and at an administrative hearing conducted according to its own rules of evidence, it is admissible in the suit at bar only on the issue of notice and not as evidence of the fact of Arrid's propensities. Cf. *Brunswick-Balke-Collender Co.* v. *American Bowling & Billiard Corp.*, 2 Cir., 1949, 150 F. 2d 69, 74 [the determination on rehearing]; *Proper* v. *John Bene & Sons*, D.C.N.Y. 1923, 295 F. 729, 731-2." 244 F. 2d at 59, note 4.

It is for considerations such as these that we believe that the Second Circuit's original *Brunswick-Balke* opinion must be disregarded as obviously mistaken in its premises, sporadic in its teaching, erroneous in its dicta and, at best, incomplete in its analysis. Having been expressly "withdrawn," it never really became part of our case law in any event.

Thus we have only one recorded instance in each decade from 1914 through 1955 in which any contention was advanced touching upon Section 5's relationship, if any, to Federal Trade Commission proceedings and orders. Each of the reported cases dealt in greater or lesser measure with the admissibility of the results of contested FTC cases in subsequent actions. Not once in forty years did anyone claim that the pendency of an FTC proceeding had tolled the limitations period otherwise applicable to claimed antitrust violations asserted in private litigation.

The alchemy by which this discredited proposition became gold could only, therefore, have been provided by Congress when, in 1955, it reviewed Section 5 and recast it into its present form.

E. The 1955 amendment to Section 5 did not bring FTC orders within its scope.

Forty years after passage of the Clayton Act, Congress took cognizance of the welter of litigation caused by the lack of a uniform statute of limitations to govern treble damage actions and, at the same time, accorded "the United States" the right to sue at law for damages caused the government by antitrust violators. The resulting enactment of Sections 4A and 4B, 69 Stat. 283, 15 U.S.C. §§15a, 15b, required conforming amendments to Section 5.

A comparison of the text of Section 5 as originally enacted with the text after its amendment in 1955—the first and, to date, only occasion on which Congress has actually amended this Section—reveals that Congress:

1. Provided—as the amendment's only substantive change—that tolling the period of limitations with respect to private claims would extend not only during pendency of proceedings "by the United States" but also for one year following termination of such proceedings;

2. Divided the prima facie evidence and tolling provisions into separately lettered paragraphs; and

3. Combined the phrases "criminal prosecution" and "suit or proceeding in equity" as they appeared in both paragraphs of Section 5 into the phrase "any civil or criminal proceeding." See pp. 3-4, *supra*.

Thus, the only language change involved the description of the "proceeding" specified. All material requirements

otherwise remained unchanged; that is, an admissible decree must still be a "final judgment or decree" rendered in (now) a "civil" or criminal proceeding "brought by or on behalf of the United States" in which a "defendant" has been found to have violated one of the designated "anti-trust laws."

Again, the reports* and debates on the 1955 amendments fail to reflect any intention to import FTC proceedings into Section 5. In fact, Representative Quigley assured the House:

> "It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131 (1955).

Congressman Keating of the subcommittee that considered the bill detailed the actual changes offered to the tolling provisions:

> "In addition to establishing a uniform statute of limitations, the bill strikes at another problem flowing therefrom, namely, the tolling of such a statute. At the present time, the tolling of the statute, with respect to private treble damage suits, exists during the pendency *of a suit by the United States.* This period is continued by the present bill. However, in order that a person might not be deprived of the benefit of the Government suit because of an abrupt termination of the Government's litigation, the bill provides for extension of the tolling period not only for the duration of *the Government suit* but also for 1 year thereafter. Thus the injured parties are provided with

* *I.e.*, Senate Report No. 619, 84th Cong., 1st Sess., pages 1-2 (1955); H. R. Rep. No. 422, 84th Cong., 1st Sess., page 2 (1955).

an adequate time in which to take advantage of the Government's antitrust proceedings.

> "There is an added precaution also provided for in this bill to prevent undue and lengthy prolongation of stale claims. By requiring a plaintiff to institute his suit either within 4 years from the date of injury or within 1 year after the final decree in a Government case, the plaintiffs will not be afforded time to procrastinate and delay." 101 Cong. Rec. 5130 (1955).

It is simply impossible to read into this statement any purpose to extend Section 5 to an administrative proceeding. Not the slightest intimation of any design to alter the coverage of the revised subsection 5(b) can be perceived. That the committee would undertake to inform the Congress just what changes the bill would make without mentioning a change of such proportions is simply incredible, particularly in view of the fact that, by 1955, the Clayton Act had been enforced for over forty years without a definitive holding anywhere that a Federal Trade Commission proceeding could toll the statute of limitations.

Moreover, the 1955 amendments had been considered for several years, and the legislative hearings going back to 1950 and 1951 lend additional and positive support to the conclusion that FTC proceedings were not and were not to be within Section 5.

The best indication of the FTC's own understanding of the scope of the Section 5 appears in a report by Acting Chairman Lowell B. Mason:

> "The objectives of the legislation proposed by H.R. 7905 are (1) to permit the Government itself, as a private party, to sue for actual damages which it has suffered by virtue of violations of the antitrust laws; (2) to establish a Federal statute of

> limitations for all suits for triple and actual damages under the antitrust laws; and (3) to make a judgment or decree in favor of the United States in a *criminal or injunction proceedings* again [sic] a defendant for violation of the antitrust laws conclusive evidence against such defendant in a suit for triple damages by a private litigant." *Hearings Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H.R. 7905,* 81st Cong., 2d Sess., Ser. No. 14, Part 5, p. 66 (hereafter "the 1950 Hearings").

Surely this interpretation of the language of the prima facie evidence provision by the enforcing agency is also a persuasive indication of the Commission's view of the scope of all of Section 5.

To dispel any lingering doubt that Congress may have overlooked the applicability of FTC orders, it should be noted that the House was specifically advised that Section 5 did not apply to FTC orders and against this background knowingly and deliberately refrained from making or even advocating a change. The Chairman of the American Bar Association's Standing Committee on Commerce raised precisely this point in a letter to Chairman Celler of the House Judiciary Committee:

> "(1) I note that you have changed the language of section 5 of the Clayton Act, which now reads: 'A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States' to read: 'A final judgment or decree hereafter rendered in any civil or criminal proceeding • • • brought by or on behalf of the United States.' There is no objection to this change, *unless* by reason thereof it could be contended that a final order of the Federal Trade Commission or of a circuit court of appeals affirming a Trade Commission

order is a judgment or decree rendered in a civil proceeding brought by or on behalf of the United States. *The courts have uniformly held in construing the present section 5 that a Federal Trade Commission proceeding was not within the purview of the act. Obviously, it should not be, since the Commission is not a court and proceedings before the Commission are not equivalent to a hearing in court.* It would be most unfortunate, it seems to me, to open up this question by changing the language which has already been definitely construed. A Federal Trade Commission action is not a suit or proceeding in equity. There may be some doubt, of course, whether a Federal Trade Commission proceeding can be said to have been brought by or on behalf of the United States. I respectfully suggest, however, that the committee should not inject an element of uncertainty as to the type of proceeding encompassed by section 5 and should either revert to the language of the original section or insert in the third line after (b)—an administrative proceeding or proceeding brought to review or modify an administrative order." *Hearings Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H.R. 3408*, 82d Cong., 1st Sess., Ser. No. 1, Part 3, pp. 21-22 (hereafter "the 1951 Hearings").

Assistant Attorney General Morison in Charge of the Antitrust Division, when asked during the 1951 Hearings (15) whether the proposed language change might include an FTC proceeding, replied: "I do not have any opinion on that one way or the other. I would like to give that a little study, because that is a point that is new to me." *Ibid.*, 16.

The suggestion was later discussed by Kenneth C. Royall:

> "Now, gentlemen, there was one matter, one question, that was raised as to something about the

FTC, by Mr. Shears. I think a careful reading of that comment will show that the suggestion of the American Bar Association was *to clarify the fact that FTC operations were not to be covered.*

"Mr. Shears [Counsel to the Subcommittee]. *That's correct.*

"Mr. Royall. *They were not to be covered in this statute, and I am sure that is a sound recommendation.*

"Mr. Shears. What is your feeling with regard to the present language?

"Mr. Royall. I do not think they should be covered by this statute because they are not of a judicial, strictly judicial, nature.

"Mr. Shears. Do you feel that the present language, without the suggested amendment of the American Bar Association, excludes the Federal Trade Commission or not?

"Mr. Royall. *It never occurred to me that it included it.* I must be frank; but, *if there is any question about it,* I think *it ought to be excluded.* However, we do not affirmatively suggest that, and we just ask that the committee give whatever consideration to the meaning of the language they think proper." 1951 Hearings 58.

It is this background of explicit information presented to the House Subcommittee concerning the state of existing law relating to FTC proceedings that makes significant the fact that nowhere in the subsequent committee reports or debates of the next four years did Congress suggest that the bill under consideration would change the law. The only plausible explanation for the substitution of the phrase "civil or criminal proceeding" in both 5(a) and 5(b) for the phrase "criminal prosecution"

and "suit or proceeding in equity" used in 1914 is that, by 1955, newer concepts of practice emanating from Rule 2, F.R.C.P., had abolished proceedings in equity, inviting a conforming change in related legislation.

Perhaps the best indication that nothing contained in the 1955 amendments changed the law with respect to administrative proceedings is that neither the District Court below nor the Court of Appeals relied on the changes Congress then made as the basis for its decision. In this respect at least, both courts below accepted the interpretation of the 1955 amendments urged by 3M, as have the other courts which took up the problem after Judge Augelli filed his opinion and before the Third Circuit spoke.

F. The 1959 amendment to Section 11 which made FTC Clayton Act orders self-enforcing did not change Section 5 expressly or implicitly.

In 1959, Congress amended Section 11 of the Clayton Act to provide that orders issued by the FTC under that Act should become final upon expiration of time to appeal and that violation of such a final order could result in a penalty of $5,000 for each day of continued violation. 73 Stat. 243, 15 U.S.C. §21(g)-(1). Hence, Congress revised the previous cumbersome mechanism for enforcing FTC Clayton Act orders and ended the disparity which had existed since the Wheeler-Lea Amendment to the FTC Act in 1938 had granted finality to FTC orders under that Act.

The Third Circuit frankly rested the entire weight of its decision on this amendment and held that, once FTC orders became enforceable upon expiration of time, they also became properly admissible as prima facie evidence

and the proceedings in which they arose would toll the statute of limitations.

The sweep of this judicial *tour de force* is apparent when one considers that Section 5 which was being construed by the Third Circuit was not itself amended in 1959 and that the legislative history which preceded the Finality Act manifests an unmistakable Congressional intention that the amendment should be *solely* procedural without effecting any change in substantive law:

> "The *sole* intent of these [proposed] subsections is to implement the enforcement procedures of the Clayton Act by making applicable the present Federal Trade Commission Act enforcement provisions. The changes contained in these subsections *are entirely procedural and make no substantive changes in law.*" H. R. Rep. 580, 86th Cong., 1st Sess. (1959) p. 6.

The Commission's understanding that the contemplated legislation was merely procedural and its understanding of the procedural handicaps to be eliminated were expressed many times. FTC Chairman Gwynne addressed a letter dated April 6, 1959 to Chairman Celler of the House Judiciary Committee:

> "The major purpose of the proposed legislation is to finalize orders issued under section 11 of the Clayton Act in the same manner in which orders issued by the Federal Trade Commission under section 5 of the Federal Trade Commission Act become final; . . .
>
> "The bills also incorporate the penalty provisions of the Federal Trade Commission Act, by providing for a civil penalty of not more than $5,000 for each violation of a commission or board order. Each violation would be considered a separate offense, except that in the case of a violation through con-

tinuing failure or neglect to obey a final order each day of continuance thereof would be deemed a separate offense. Penalty suits would be filed by the Attorney General upon the certification of the facts by the appropriate commission or board.

"The effectiveness of the Clayton Act, as amended by the Robinson-Patman Act, has long been handicapped by the absence of adequate enforcement provisions. Existing procedures are laborious, time consuming, and very expensive. The Federal Trade Commission must investigate and after complaint prove, on the record, violations of the act before a cease and desist order may be issued. After the order to cease and desist has been issued, the Commission must again investigate and again prove violations of the order and of the act before the Commission can obtain a court order commanding obedience to the Commission's order to cease and desist. Upon such proof, the court enforces the Commission's order. Only then, if the respondent violates the act a third time, does he become subject to penalty. Thus, before a respondent can actually be punished for violation of the Clayton Act, as amended by the Robinson-Patman Act, the Federal Trade Commission must conduct three successive investigations and must on three successive occasions prove violations of the law. . . .

"The proposed legislation would fill the enforcement void which has existed for many years. The Commission has sought such legislation for more than 20 years . . ." H.R. Rep. 580, 86th Cong., 1st Sess. (1959), pages 20-21.

See also the statement by Commissioner Anderson to the effect that the bill's changes were procedural, 1959 Hearings, pages 16-17, and the Commission's statement to the Committee, 1959 Hearings, pages 32-35.

Diligent study of Senate documents similarly reveals a complete absence of discussion of Section 5 or of any

impingement thereon, much less any suggestion that any change in its scope was considered or intended. Sen. Rep. 83, 86th Cong., 1st Sess. (1959). Under these circumstances, the Third Circuit's assertion that the Finality Act did somehow amend Section 5 by implication can hardly meet with favor. Cf. *U. S.* v. *Madigan*, 300 U. S. 500, 506 (1937).

To the Third Circuit, the Finality Act nevertheless meant that the FTC proceeding resulting now "in such final order *or decree* is a 'proceeding in equity' and a 'civil proceeding' within the meaning of Section 5" (R. 84-5). In so holding that, solely because of this new finality, FTC Clayton Act orders now met Section 5(a)'s requirement of a "final judgment or decree," the court below fell into direct conflict—as had the Second Circuit in its "withdrawn" *Brunswick-Balke* opinion—with the rationale by which the identical 1938 Wheeler-Lea amendments to the Federal Trade Commission Act had been upheld:

> "The constitutionality of section 5 of the statute, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C.A. § 45, is challenged. It is argued that the amendment gives to an order to cease and desist from a trade practice the full force and effect of a judgment or decree of a court, thus vesting judicial power in the Commission. The amendment provides that the order shall become final upon the expiration of the time allowed for the filing of a petition for review, if no such petition has been filed within that time. The change relates solely to the remedy of the Government for its enforcement; it does not transform the order into the equivalent of a legislative act or a judgment or decree of a court; and the provision for judicial review meets the requirements of due process." *Ostler Candy Co.* v. *FTC*, 106 F. 2d 962, 964 (10th Cir., 1939), cert den. 309 U. S. 675 (1940).

After the 1959 amendment, there were no reported decisions touching upon the applicability of Section 5 to administrative orders until the District Court opinion below. As previously noted, Judge Augelli read Section 5(b) as authorizing tolling of the period of limitations during pendency of an FTC proceeding. He did not consider whether administrative orders could constitute prima facie evidence and included administrative proceedings within Section 5(b) only because he found a broader purpose in the tolling provision than in the prima facie evidence provision. In Point II(B), *infra*, we demonstrate that this interpretation lacks any warrant in the statutory words and that previous authority had established that the two subsections are to be read *in pari materia*.

Chief Judge Taylor of the Eastern District of Tennessee first considered Judge Augelli's determination and, in *Volasco Products Co.* v. *Fry Roofing Co.*, 223 F. Supp. 712 (E. D. Tenn., 1963), rejected that ruling as "doubtful authority" (p. 713). Next, Judge Meredith in *Highland Supply Corp.* v. *Reynolds Metals Co.*, 221 F. Supp. 15, 17 (E.D. Mo., 1963) noted that, although the FTC shares jurisdiction with the Justice Department to enforce certain sections of the Act, this could not alter the fact that Congress "by its language" had provided for a tolling of limitations only for judicial proceedings. Finally, in *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, *supra*, 223 F. Supp. 967, Judge Gignoux concluded after a thorough review of the legislative history and previous judicial interpretations of Section 5 that FTC proceedings had never been and were not within its purview.*

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* The First Circuit denied plaintiff's application under §1292(b), 28 U.S.C., to appeal Judge Gignoux's decision in an order dated December 10, 1963 (Case #6244).

During pendency of the appeal to the Third Circuit in the case at bar, the Eighth Circuit accepted an interlocutory appeal in the *Highland Supply* case and, while reversing the District Court's rulings on other grounds, expressly affirmed Judge Meredith's holding that an FTC proceeding could not toll the statute of limitations in a unanimous opinion by Circuit Judge Ridge. To the Eighth Circuit, the language of Section 5 so clearly excluded FTC proceedings that resort to legislative history for guidance was unnecessary. *Highland Supply Co.* v. *Reynolds Metals Company, supra,* 327 F. 2d at 730. Here again, Judge Augelli's views were characterized as "of doubtful authority" and the court expressly refused to follow the implications of the original *Brunswick-Balke* opinion, as had all three district courts.

Nor did even the Third Circuit follow Judge Augelli in his construction of Section 5. Instead, that Court advanced the novel interpretation that administrative orders and proceedings came within the ambit of both paragraphs of Section 5 thanks to the elimination by Congress of the procedural difficulties which formerly beset FTC Clayton Act orders. This, said Judge McLaughlin, "vitalized" (R. 91) the *Brunswick-Balke* rationale (which had hardly flourished since it was "withdrawn" when first announced and was subsequently expressly repudiated in *Wright* v. *Carter Products, supra,* in the same Circuit).

The separate paths by which the courts below reached the same conclusion is simply reflective of an underlying question of antitrust policy: Should FTC determinations only define and prohibit future conduct of respondents or should such findings, in addition, determine rights (and monetary liabilities) in subsequent disputes between respondents and third persons?

Faced squarely, it is obvious that the decisions below both adopt the latter view, Judge Augelli because he did not think rights should devolve on whch of two governmental arms first takes up the cudgels and the Third Circuit because of an assumed extension of Section 5 through a procedural amendment to Section 11. The Circuit Court's rationale is only slightly more sophisticated than that of the District Court: Both defy the Act's plain language, the evident Congressional intent at all stages and the better reasoned cases. Both also, as we now demonstrate, speak to most dubious policies of antitrust enforcement although, so to speak, on different wave lengths.

II

In extending Section 5 to administrative proceedings, the courts below erroneously invaded the province of Congress.

Although the basic task on this appeal is to determine what the statute means—and, as advocates, our primary concern is with what the law is rather than with what it might or should be—policy considerations may nevertheless throw light beyond that cast by the language of the Act itself, its legislative history and prior judicial construction.

Those who might feel, with the Third Circuit, that the 1959 amendment brought administrative proceedings within the scope of Section 5 must, in all candor, concede they are inferring Congressional purposes never before articulated. On the other hand, to those who might think, with Judge Augelli, that Congress simply overlooked an obvious anomaly, several reasons for caution suggest themselves, some of which we now discuss. In the course of this discussion, we do not pretend to an all-seeing wisdom: in

fact, we are confident only, as we head down this path, that advocates in a single controversy are seldom in the best position to present all the policy questions which may be properly relevant to the problem at hand. With respect for the courts below, we suggest that judges also share this inherent limitation and that novel propositions of statutory extension are really best presented to the legislative arm. Cf. *62 Cases of Jam* v. *U. S.*, 340 U. S. 593, 596 (1951).

A. Constitutional implications of the Third Circuit's Rationale.

Our law has always recognized qualitative differences between judicial and administrative determinations of fact. So far, problems of Constitutional due process arising from these differences have been avoided by allowing no scope to FTC orders in determining financial liability. Courts have recognized that, when liability for past conduct is at issue, private persons are better protected by the safeguards surrounding judicial inquiries and we have generally adhered to the right, waivable of course, to trial by jury where such liability—criminal or monetary—is at stake.

Thus government antitrust prosecutions and "civil proceedings" carry all the inherent common law safeguards designed to validate the judgments and decrees reached in that wholesome, if laborious, process which antitrust (and all other) "defendants" have properly come to regard as their "due."

Although not always carefully analyzed in the cases, it seems incontestable that most authorities from 1914 on detected substantive differences in the quality of judicial and administrative determinations of fact which formed the basic policy underlying the distinguishing words used

by Congress whenever it referred to judicial or administrative processes and determinations.

These recognized qualitative differences in fact determinations spring ultimately from the relatively unrestricted manner in which information, incompetent in a common law court, might provide the foundation for administrative determinations and actions. Since the function of agencies such as the FTC is also investigative and quasi-legislative—that is to discover and eradicate "unfair methods of competition"—Congress determined in 1914 that rules of evidence could and should be relaxed, and the Trade Commission and others took advantage of this freedom:

> "The surveys and summaries of judicial decisions set forth above indicate that the Interstate Commerce Commission, with judicial sanction, contents itself largely with infringement of the hearsay rule, the Federal Trade Commission with violation of the hearsay rule, the best evidence rule, and the opinion rule. * * * The Federal Trade Commission receives, with judicial approval, lay opinions as to the use of solutions, hearsay as to events and correspondence not within a witness' knowledge, secondary evidence as to the contents of books, and testimony immaterial because not connected." Stephens, *Administrative Tribunals and the Rules of Evidence* (Harvard, 1933), page 90.

A more recent study concludes that judicial review of FTC determinations has always been and remains broader than similar review of ICC findings both because of judicial concern for the quality of FTC findings and because FTC regulation touches the very heart of private business conduct. Cooper, *Administrative Agencies and the Courts,* (Michigan, 1951), pages 360-70. See also generally an earlier study by McFarland, *Judicial Control of the Fed-*

eral Trade Commission and the Interstate Commerce Commission, 1920-1930 (Harvard, 1933).

The policy behind relaxation of the rules of evidence, however, could not persuasively apply to that portion of the work of the FTC and other agencies which was concerned with adjudicating instances of prohibited conduct by individuals and corporations, a process which more or less corresponds to the work of the courts. Any real impracticality in requiring the Commission to work separate procedures to govern its different activities was obviated, however, when Congress in 1914 provided that the Commission's sanction in its adjudicative proceedings should operate prospectively only. The objective in 1914 was to prohibit the demonstrated proclivities of trusts before they reached Sherman Act proportions and, to this end, Congress created a Trade Commission that could devote itself to investigating and bringing to light cases of otherwise undefined "unfair methods of competition" as they might arise on a case-by-case basis in an attempt to balance the ingenuity of the trusts with an administrative expertise through §5 of the FTC Act. The Commission was also to enforce prohibitions against business practices considered so offensive that they were expressly defined and forbidden in Sections 2, 3, 7 and 8 of the Clayton Act. But in both Acts, Congress rejected proposals to provide sanctions for past conduct which the Commission might determine to be a violation and the enforcement mechanism was confined to ordering the respondent to cease and desist from prohibited conduct in the future, a remedy peculiarly appropriate to regulation in new and uncharted seas. Using Commission orders as prima facie evidence or, for that matter, tolling limitations during Commission proceedings would directly punish respondents with treble damages for past conduct found unlawful only by the Commission operating under administrative procedures and standards of evidence.

This Court in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948) would never have justified Commission procedures that admitted hearsay and other legally incompetent evidence, if the Court had believed that Commission orders could thereafter constitute prima facie evidence of past conduct or that Commission proceedings could toll the limitations otherwise applicable to past conduct:

> "Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. * * * And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress." (pp. 705-6).

Accord: *Federal Trade Commission* v. *Ruberoid*, 343 U. S. 470, 473 (1951):

> "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."

While seeming to concede that the FTC's "more liberal" evidentiary rules and the "broader" administration process puts FTC proceedings on "a somewhat unequal footing" with similar judicial proceedings, Judge McLaughlin, nevertheless, feels no great concern about admitting FTC orders in subsequent treble damage actions because, in his view, the defendants can always attack the "weight" of prima facie evidence if not its "propriety" (R. 88). Perhaps a defendant against whom such an order is admitted theoretically could introduce rebuttal evidence to diminish its effect. But it seems doubtful

that Judge McLaughlin intended that a defendant would —or could—prove to the triers of fact in the subsequent action that the ultimate findings and factual conclusions included in the typical commission order had been based on hearsay, lay opinions, legally unfounded or other incompetent evidence. Indeed, in all likelihood, such administrative orders would be considered the equivalent of judgments or decrees—a determination necessarily made (but contrary to *Ostler* v. *FTC, supra*) by Judge McLaughlin to qualify such orders under Section 5 in the first place—and collateral attack on a judgment is, of course, estopped; otherwise, the second action becomes a retrial of the first. Thus, the treble damage defendant could expect no real opportunity to bring to the attention of the trier of fact, much less overcome, any legally incompetent evidence which might underlie the administrative order introduced against him.

To justify the use of such evidence in private suits, Judge McLaughlin cites (R. 88) a section of the Interstate Commerce Act, 49 U.S.C. §16(13),* which provides that a reparation order of the ICC is admissible as prima facie evidence in an action for damages by a shipper against a defendant carrier found by the ICC to have exacted unreasonable rates. Even if we concede, however, that some legally incompetent evidence may underlie an ICC order which then becomes admissible—and the ICC, of course, works in a highly specialized area with data far more technical and precise than that handled by the FTC—the ICC proceeding at least does meet another requirement of due process that FTC Clayton Act enforcement could not provide. Under the ICC statute, the very issue of the monetary liability of a particular "defendant" for past conduct in relation to the particular plaintiff is first tried in an adversary proceeding,** albeit before

* Judge McLaughlin probably intended §16(2).

** See, *passim*, ICC Rules, 49 C.F.R. 1.1-1.98.

an administrative tribunal, and, if damages are awarded, that plaintiff (and no other) may then collect through court. In a private antitrust action, on the other hand, the administrative determination would be offered as prima facie evidence of monetary liability by one not previously party to the administrative proceeding.

The matter of legally incompetent evidence might also be considered from the point of view of the regulatory agencies. If, contrary to present understanding, it should become the law that agency determinations may constitute prima facie evidence in private treble damage actions, they may feel obliged to conduct their adjudicatory proceedings with greater conformity to judicial models than at present. To the extent such procedures are revised, the agencies may then create either separate internal procedures for adjudicatory and for rule making matters or, if the agencies adopt stricter rules of practice throughout, perhaps lessen their utility in their quasi-legislative functions.

If, on the other hand, the FTC, as one of the agencies involved, should fail to temper its "more liberal evidentiary rules" (R. 88), the anomalous result will be that a treble damage defendant will have a right to have his liability tested solely according to common law procedures (both in the action by the United States and in the subsequent private action) if the Justice Department happens to take jurisdiction of the matter but not so if the proceeding is initiated by the FTC. Those who believe this disparity a minor matter might well recall Dean Pound's remarks on the equality of administrative justice:

> "What are these characteristics of administrative adjudication? The more significant ones for our purpose may be summed up in seven tendencies.
>
> "First and most serious among these tendencies is one going counter to what has always been the first principle of judicial justice, namely, to hear

both sides fully and with scrupulous fairness. In administrative adjudication there is everywhere an obstinate tendency to decide without hearing one of the parties, or after conference with one of the parties in the absence of the other whose interests are adversely affected. . . .

"A second tendency is to make determinations upon the basis of consultations had in private or of reports not divulged, giving the party affected no opportunity to refute or explain. . . .

"Third, there is a tendency to make determinations of fact seriously affecting individual rights without a basis in substantial evidence or in any evidence of rational probative force, much less sustained by the reasonable weight of the evidence as a whole. . . .

"A fourth tendency is to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency. It is very easy to say that the public interest demands or justifies activity beyond or in contravention of the statute and to cover this up by a general pronouncement upon the case. Usually this is done out of zeal to promote supposed social ends to which the legislative body might or might not agree. . . .

"Connected with this last tendency and with the one to decide without any basis in substantial evidence, is a fifth tendency namely, to determine facts not on the basis of hearing and evidence but on the basis of preconceptions or assumptions of facts to fit the assumed exigencies of a policy. . . .

"Another closely connected tendency, growing out of the setting up of administrative agencies to investigate, prosecute, and adjudicate, is one to make no separation of facts and law, or of facts, law, and policy to be applied to facts. In all legal systems the history of appellate procedure shows the importance of separating ascertainment of the facts, as a process, from ascertainment of the applicable law and application of the ascertained law to the facts. . . .

> "A seventh characteristic of administrative justice is a tendency to delegate decision to subordinates where the law requires decision to be made by the head, and to make decision by the responsible authority a perfunctory matter. This is something that was forbidden in judicial justice long ago." Roscoe Pound, *For the "Minority Report"*, 27 ABAJ 664, 665-9 (1941).

It is, of course, true that much of what Dean Pound criticized was corrected, or at least ameliorated, by enactment of the Administrative Procedure Act of 1946.* However, in three major facets—each, we submit, of constitutional import—the administrative adjudicative processes suffer in comparison to the judicial:

1. Agency respondents cannot avail themselves of the right of trial by jury as is the case in a criminal prosecution;

2. Legally incompetent "evidence" can still be taken by hearing examiners and accepted by the commission reviewing the record as experts; and

3. Judicial review is limited to questions of law (including, so far as the factual record is concerned, simply whether there is "evidence" in the record to sustain the findings made) and whether agency discretion has been abused (*e.g., Moog Industries* v. *F.T.C.*, 355 U. S. 411 [1958]).

These shortcomings, we submit, are accentuated in terms of constitutional due process when one considers that the treble damage feature of private antitrust enforcement is intended to be, and surely is, punitive rather than merely remedial. Not only is the victim of a proven antitrust violation to be compensated, but the perpetrator is required to pay twice again (and, for good measure, contribute handsomely to his victim's counsel fees and costs

* 60 Stat. 237, as amended; 5 U.S.C., §1001 *et seq.*

of prosecution) all in the nature of a civil fine.* There is nowhere in our law a more drastic "taking of property" and yet the courts below are prepared to take such property without trial by jury, without normal evidentiary safeguards and without conventional appellate protection.

B. Judge Augelli's contrary rationale notwithstanding, Section 5's dual provisions should be construed together: Proceedings that cannot yield prima facie evidence do not toll limitations.

By holding, in effect, that Section 5's two paragraphs dealt with separate problems and should be separately construed, Judge Augelli—at least for the case at hand—avoided the constitutional pitfalls to which we have just alluded. This course also obviated equating FTC cease and desist orders to §5(a)'s requirement of a "judgment or decree." However, Judge Augelli's rationale cannot provide a safe retreat from those infirmities implicit in the Third Circuit's decision.

One arresting aspect of this case is that, while we argued in both courts below that administrative orders cannot constitute prima facie evidence of antitrust violations, our adversary has consistently refrained from arguing that they can. Given the state of the law on this point before Judge McLaughlin wrote, plaintiff's circumspection seemed well warranted. Our effort to convince those courts that the prima facie evidence paragraph of Section 5 did not embrace administrative proceedings was, we felt, required—notwithstanding that the particular FTC order here was entered on consent and, hence, cannot constitute prima facie evidence**—partly

* See, *e.g.*, *Leh* v. *General Petroleum Corp.*, 300 F. 2d 288, 301 (9th Cir., 1964) pending here, No. 348.

** Remember, however, that in *Highland Supply Corp.* v. *Reynolds Metals Co.*, *supra*, the FTC proceeding was litigated to a conclusion adverse to the respondent.

because the decisions construing Section 5 have usually involved §5(a).

Since the statutory phraseology is identical in both paragraphs of Section 5, we have also argued that the same words in two paragraphs of the same section of the statute must mean the same thing and that, *ergo*, if an FTC proceeding is not a "civil or criminal proceeding" by "the United States" within the meaning of the prima facie evidence provision in 5(a), neither can it be such a proceeding within the meaning of 5(b), the tolling paragraph. Cf. *Schooler* v. *U. S.* 231 F. 2d 560, 563 (8th Cir., 1956): "In the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere. . . ."*

Judge McLaughlin obviously accepted the validity of this reasoning but concluded—wrongly, we believe—that FTC orders were the full legal equivalent of court judgments and decrees for all Section 5 purposes. Plaintiff, however, has always urged the more restricted—if equally untenable—proposition that an FTC proceeding should be capable of tolling limitations even though such a proceeding may not be capable of producing an order admissible as prima facie evidence. Thus plaintiff's argument has rested on the dual proposition that, while Section 5 extends to FTC orders, the two paragraphs—now, and since 1955, two subsections—of Section 5 should be construed separately so that a proceeding that cannot produce qualified evidence under the first paragraph, may nevertheless serve to suspend limitations under the second.

* Compare also, *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 (1941): "It is hardly credible that Congress used the term 'person' in different senses in the same sentence" of the Clayton Act.

The second proposition—although it apparently appealed to Judge Augelli—is as weak as the first. Not only is it gainsaid by the language of the two paragraphs which imposed virtually identical requirements for the type of proceeding contemplated, but Congressional history and judicial authority have established that the only purpose of the tolling provision was to accord private plaintiffs adequate opportunity to invoke a "judgment or decree"—*i.e.*, judicially sanctioned findings of fact and conclusions of law. It follows almost *a fortiori* that the tolling provision was not to apply to a "civil proceeding" which could not result in an admissible judgment or decree.

Certainly nothing said or done in 1914 raised any inference that the two paragraphs were to be read so disjointedly that an FTC proceeding might toll limitations although it could not result in prima facie evidence. Judge McLaughlin acknowledged this (R. 87) and other judges have read the two paragraphs *in pari materia*. In *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, (D. Mass., 1942) aff'd 172 F. 2d 37 (1st Cir., 1948), Judge Wyzanski held:

> "Since judgments there [in prior government suits] could not serve as prima facie evidence here, those proceedings cannot toll the statute of limitations for the benefit of this plaintiff. This is clear from the juxtaposition of the two paragraphs which together constitute Section 5 of the Clayton Act" (p. 1012).

Other courts have agreed:

> "While we are concerned with the tolling provisions of the second paragraph of that Section [5] only, the two paragraphs are complementary and must be construed together." *Sun Theatre Corp.* v. *RKO*

Radio Pictures, Inc., 213 F. 2d 284, 290 (7th Cir., 1954).

> "The considerations adduced above in connection with the tolling of the statute of limitations should suffice to dispose of the estoppel issue as well, since the two parts of Section 5 here in question are to be construed together." *Samuel Goldwyn Prod.* v. *Fox West Coast Theatres Corp.*, 146 F. Supp. 905, 908 (N.D. Cal., 1956) rev'd on other grounds 328 F. 2d 190, 220 (9th Cir., 1964).

In *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 154 F. Supp. 216, 218 (D.C. Minn., 1957), aff'd 289 F. 2d 418 (8th Cir., 1961), Judge Nordbye put the matter as follows:

> "It must be remembered that one of the primary purposes of this [tolling] statute was to give private litigants the benefit of decrees in the government litigation."

Judge Nordbye then held, as had Judge Wyzanski, that where a government decree was inadmissible against a defendant in a private action (because the defendant had not been a party to the government proceeding) the limitations period was not tolled. For the very same reason, Judge Augelli here directed New Jersey Wood to reframe its complaint as against Essex to eliminate the Clayton Act charge and, with respect to its Sherman Act claims, to allege the commission of overt acts within the four-year period preceding the original complaint (R. 56a).

Clearly, pendency of an FTC proceeding which cannot create admissible evidence does not and should not toll the statute of limitations since the very purpose for which tolling is provided is absent.

Despite these considerations, the District Court below held that Section 5(b) is much broader in purpose than Section 5(a) and is, in effect, designed "* * * to allow antitrust litigants an opportunity, which might otherwise be barred by the four year statute of limitations, to take advantage of facts uncovered in related Government proceedings" (64a). Since it considered both paragraphs of the Section spacious enough to accommodate FTC proceedings, the Third Circuit did not adopt this view, although Judge McLaughlin commented (R. 89) that the District Court's holding enjoyed "substantial support".

In fact, the "support" carries no weight. Certainly Judge Augelli's expressed reason for his policy determination is not persuasive; indeed, the learned Court seems to have assumed the very point that the FTC did *not* prove in the case at bar. Witness the sentence following that quoted above:

> "Thus, a private party which has suffered damages to its business *by reason of unlawful antitrust activity* is permitted additional time to derive the benefits of a Government investigation" (R. 64a).

If Judge Augelli's view of the scope of Section 5(b) becomes the law, the result will be that any defendant in an antitrust proceeding, whether such proceeding is initiated by the Justice Department, by the FTC or by any other agency vested under Section 7 with antitrust competence, will face an extended limitations period merely by reason of the commencement of the proceeding. Should the proceeding ultimately be dismissed upon a determination that the defendant (or respondent) had not engaged in prohibited conduct or, as in the case at bar, terminate in a consent order before the taking of any testimony, it would be clear that no violation was proved: Certainly

no wrongdoing was proved in the FTC proceeding relied upon by plaintiff here. Thus, it is an insufficient answer to a defendant not found guilty of any wrongdoing to justify any "additional time" on the assumption that "unlawful antitrust activity" was proved. Surely it unfairly penalizes a defendant later found blameless to hold that he must defend against a private antitrust claim for an extended number of years merely because he was the subject of a Government "investigation" and action.*

Nor need we anticipate the argument that the tolling provision becomes illusory if the private suitor must start his action within the four-year period in any event as a hedge against the government's case aborting. It suffices for present purposes to point out that, as a practical matter, the private suitor is prejudiced only by his own indolence and not by the government's failure to secure a usable conviction or decree. Our point is simply that the "civil or criminal proceeding" instituted must—at the very least—be one that *can* produce a judgment or decree, irrespective of whether in fact one does eventuate.

Of course, it remains true that, even though the United States fails to prove a violation, a private plaintiff can still try his action just as though the government had never instituted suit. But tolling was intended to preserve a "final judgment or decree" only where the United States obtained one. Certainly the available legislative history supports this conclusion:

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* The explanation offered in *Fifth & Walnut, Inc.* v. *Loew's, Inc.*, 176 F. 2d 587 (2d Cir., 1949), for making prima facie evidence rest only on a "final judgment or decree" would seem applicable to the tolling provision. After all, said the Court, Section 5, while broadly remedial, is nevertheless so "drastic" in its consequences that it cannot "fairly be applied to cases where the action of the court may still remain in doubt" (p. 593).

> "Many combinations have been dissolved under the Sherman law by the decree of the United States Courts * * *. This proposes to suspend the statute of limitations during the continuation of such suits, and at the end of the suit, if the Government obtains a decree, or a decree is obtained, provides that that may be used in evidence in behalf of the private suitor in a suit for damages under Section 7 of the Sherman law and under the corresponding section of this bill." 51 Cong. Rec. 9164 (1914). (Representative Floyd).

Nor is the holding really supported by the authorities which Judge Augelli cited. Senate Report 619 refers only to the 1955 proposal to extend the tolling period one year following termination of a government proceeding and reflects no more than Congress' intent to give a prospective plaintiff adequate time to assess the effect of a government-obtained judgment or decree upon his particular situation. There is just no support for the notion that Congress intended to toll the statute so that the private plaintiff might—as a substitute for discovery—utilize "facts" developed by the government either in an unsuccessful prosecution or not adduced as evidence in proceeding terminating in an admissible judgment or decree.

Again the 1914 debates are enlightening. That Congress did not contemplate private plaintiffs gaining evidentiary advantages from a contemplated prosecution—as distinguished from the findings and/or rulings contained in the eventual judgment or decree—is clear from Senator Chilton's criticism of the provision:

> "The only demand which I have ever heard from litigants * * * was that the evidence taken by the Government in a prosecution against a trust might be available for a private suitor on the ground that

> the Government is able to get evidence which the private suitor could not. * * * It is my judgment that there would be more relief to those who would be injured by the violation of the antitrust laws if the provision had been that any evidence taken in any trust suit by the United States should be available against the same defendant where certified by the clerk of the court. This would give a litigant a right to the evidence regardless of the outcome of the case. It would give no more effect to that evidence than could be given to it if it had been taken in open court in the second litigation, but it would enable suitors to get evidence which otherwise they could not procure." 51 Cong. Rec. 16003 (1914).

By the same token, an amendment offered to give private litigants the benefit of facts proved in government proceedings was quickly withdrawn when Representative Floyd, among others, pointed out that, under that amendment, the facts established would necessarily bind private plaintiffs as well as defendants, 51 Cong. Rec. 9494-95 (1914).

Nor has Congress since 1914 manifested any intent to grant private litigants any particular advantage from evidence obtained by the Government. The 1950 Hearings contain direct evidence that members of Congress intended no benefit from government proceedings beyond what the statute expressly gave in the case of final judgments:

> "Mr. Michener: I had, within the last few months, an attorney from Michigan come to see me in Washington. He wanted me to assist him in getting certain files in the Department of Justice, which files included an investigation the Department had made of an alleged violation of the antitrust laws. I asked him what he wanted that information for, and he said that he could recover triple damages if he brought suit. Now that the Department of Justice

had looked up this case and had done all of the work, there wasn't anything for him left to do except to start suit; and in those files he would find his proof. *Now, would you want to give a premium to attorneys of that type, who sit around and wait until the Government has developed a case, has spent the money, and then bring suit for triple damages, and get his triple damages based on the work that the Government has done?*

"Mr. Bryson. And maybe have a contract for 50 percent of what they recover.

"Mr. Michener. Yes.

"Mr. Handler. Congressman, the pending bill would not assist the counsel in the case that you have put. The files of the Government are closed to the private litigant. He must establish his case following the normal procedure applicable in the Federal courts himself or he must stand by and await the conclusion of the Government litigation and it is only after the litigation is concluded, and final judgment is entered after contest, that the judgment or decree becomes available to him." 1950 Hearings 5.

That government files are closed to private plaintiffs literally cuts the ground from under any rationalization that Congress somehow intended plaintiffs "to take advantage of facts uncovered" in government proceedings.

If more were needed, certainly the change made in the original proposal to allow the government the right to sue as a private party for single damages is conclusive evidence that Congress intended tolling to occur only in the event of an admissible final decree. The 1950 bill did not allow such suits to create prima facie evidence but did provide that limitations would nevertheless be tolled during their pendency. The American Bar Association's Standing Committee on Commerce protested:

"It does not seem necessary or advisable to include within the purview of Section 5(b) a civil

> action brought by the United States to recover for damages pursuant to Section 4(b) of the proposed act. *A judgment in such a civil action is expressly excluded* from the provisions of Section 5(a) making judgments or decrees in civil or criminal proceedings brought by the United States conclusive evidence against a defendant in a triple-damage action. *There seems to be no good reason, therefore, why under Section 5(b) the statute of limitations should be suspended* during the pendency of a Government suit to recover damages. * * *" 1950 Hearings 97.

After the New York County Lawyers Association echoed this protest the following year, 1951 Hearings 28, the House Committee dropped this tolling proposal from the bill and it did not reappear in 1955 and is not law today.

No more persuasive is *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2d 561, 569 (10th Cir., 1962), app. dism'd 371 U. S. 801 (1962), also cited by the District Court for its novel determination that tolling is allowed in order that private plaintiffs might derive "the benefits of a government investigation" irrespective of its outcome. Plaintiff has repeatedly ballooned a comment by Judge Murrah in *Union Carbide* to the effect that 5(a) and 5(b) are not "co-extensive" into an argument that a commission proceeding tolls the statute of limitations under 5(b) even though it may not be the kind of proceeding that could produce prima facie evidence under 5(a).

While it may be that in some respects the reach of the two paragraphs of Section 5 is not "co-extensive"—*i.e.*, prima facie evidence can arise only from matters *determined* in the government action while tolling applies to all matters *"complained of"*—Judge Murrah hardly supports plaintiff's reading that, while FTC proceedings may fall outside 5(a), nevertheless—and in the face of obvious

language identity in the type of "civil or criminal proceeding" that qualifies under either subsection—5(b) is somehow more liberal than 5(a). In using the phrase upon which plaintiff so heavily relies, Judge Murrah did not address himself to the *kind* or *nature* of the proceeding contemplated by Section 5. He did not suggest—and neither has any other previous authority—that an FTC proceeding will fit the definition of a "civil or criminal proceeding" brought "by the United States" in 5(b) although it would fail to fit the same definition in 5(a). No court before Judge Augelli had suggested that the subsections are any less than "co-extensive" in respect to the basic problem before this Court of whether or not administrative proceedings are included at all. Certainly the statutory language provides no warrant for deciding that administrative proceedings are within the contemplation of the tolling subsection but outside the purview of the evidentiary subsection.

It is a matter quite different from *Union Carbide's* tolling problem to say that Congress intended that an FTC proceeding would toll the statute for a private litigant so that he would not be required to undertake discovery of his own even though the FTC's "final judgment or decree" can never be used as prima facie evidence.

Moreover, *Union Carbide* expressly holds that the two paragraphs of Section 5 "should be construed together" and proceeds to accept the traditional view of the Section's "complementary" purposes:

> "The purpose of the first paragraph of Section 5 was • • • 'to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.' • • •

> "The corollary purpose of the tolling provisions * * * is to vouchsafe the intended benefits of related government proceedings by suspending * * * limitations until the termination of the government proceedings. * * *" 300 F. 2d at 569.

Thus if the purpose of Section 5(b) is to lend utility to an "estoppel"—*i.e.*, an estoppel by "judgment or decree" —that purpose is wholly frustrated without the requisite judgment or decree admissible as prima facie evidence. Certainly no estoppel arose in this case upon entry of an FTC consent order; thus the purpose for which tolling is allowed is absent.

C. In resolving one "anomaly", the courts below have either ignored or created others.

To accommodate an ambiguous statute to a stated purpose of Congress is one thing; to correct what one conceives to be a Congressional oversight in the guise of eliminating an "anomaly" (R. 80) from otherwise unambiguous enactments is quite another. See, *e.g.*, *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 618 (1944). Yet this is precisely what the courts below have done in undertaking to determine what is essentially a question of legislative policy in a piecemeal fashion. Cf. *62 Cases of Jam* v. *U. S.*, *supra*, 340 U. S. at 600.

Thus Judge Augelli, noting that the FTC and the Department of Justice have concurrent jurisdiction to enforce Section 7, simply could not accept as "logical" that Congress intended to have private plaintiffs' rights under Section 5 "turn on the fortuitous circumstance of which agency initiated the action" (R. 64a).

However, over the years, the principal efficacy of Section 5 has derived from the Attorney General's prosecutions of Sherman Act offenders. Is it not also anomalous

that the FTC has no jurisdiction, as such, to enforce the Sherman Act? Of course the FTC does reach conduct violative of the Sherman Act through proceedings instituted under Section 5 of the Federal Trade Commission Act which, in turn, produce orders to cease and desist from such conduct supported by appropriate "evidence" in hearing records. See, *e.g., FTC* v. *Cement Institute,* 333 U. S. 683 (1948). However, respondents in FTC Act proceedings are clearly not thereafter subject to any application of Section 5 of the Clayton Act since the Federal Trade Commission Act is, by statutory definition, excluded from the specific "antitrust laws" referred to in Section 5 and defined in Section 1 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §12; see *Nashville Milk Co.* v. *Carnation Co.,* 355 U. S. 373 (1958).

Thus, even if this Court affirms the courts below, the result will not place Justice Department and FTC proceedings on an equal footing *vis a vis* a private plaintiff but will only create a new disparity (without statutory support) between FTC Clayton Act proceedings which could become a source of prima facie evidence and could toll the statute and FTC Act proceedings designed to reach Sherman Act transgressions before the Commission which could not.

The predictable by-product of any such new disparity—apart from, perhaps, chance assistance to some private plaintiffs—will be a flood of litigation reminiscent of the free-for-all engendered by forty years of Congressional silence on the appropriate period of limitations on private actions.*

* Since FTC complaints frequently charge violations of *both* the FTC Act *and;* for instance, the Robinson-Patman amendments to the Clayton Act, an additional disparity between the Acts for Section 5 purposes can be expected to foment considerable ingenuity by private suitors and district judges to determine just what, in such cases, the FTC did ultimately decide.

Another consideration which militates against Judge McLaughlin's method of correcting the supposed "anomaly" is that, if an FTC order can constitute prima facie evidence, such orders must thereby work estoppels against the Justice Department in any subsequent proceedings. This result necessarily flows from 5(a)'s provision that the "judgment or decree" (affirmance here, of course, depends on equating agency determinations with judicial judgments and decrees) can only be prima facie evidence as to matters "respecting which said judgment or decree would be an estoppel as between the parties thereto". Since affirmance of this decision will mean that the Commission has become "the United States" for Section 5 purposes, the Justice Department will be foreclosed from making the argument which persuaded the courts in *Pfizer* and the other cases cited, *supra,* at pages 20-22, that the FTC is not the United States and the latter is not bound—*i.e.,* estopped—by FTC determinations. Surely, the Justice Department would wish such a result to become law only after a thorough review by Congress of the various aspects of government antitrust enforcement and private treble damage actions which argue for and against such a policy.

Since, in determining the meaning of Section 5, this Court must take cognizance of all antitrust policy considerations including government antitrust enforcement as well as private treble damage actions, it may be well to point out that these two antitrust enforcement mechanisms sometimes do conflict.* However it nowhere appears in the

*After all, statutory anomalies are neither unknown nor odious *per se*. For instance, despite the constant prod from the FTC of which Chairman Gwynne spoke, *supra*, p. 43, Congress did allow the obvious anomaly in the finality of Clayton Act, as against FTC Act, cease and desist orders to persist for the entire twenty-one year period between the 1938 Wheeler-Lea amendment to the FTC Act and the 1959 amendment to Section 11 of the Clayton Act, an anomaly which the Second Circuit ultimately respected in *Brunswick-Balke* and no other court ever challenged.

statutory history that Congress preferred haphazard private suits as the primary enforcement policy. To the contrary, Congress put its principal reliance on action "by the United States" and was prepared, when necessary to simplify government litigation brought to uphold the public interest, to encourage defendants to accept consent decrees that would thereupon be unavailable to private plaintiffs. See *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 376 (D. C. Minn., 1939). If the statute of limitations is now to be tolled during the pendency of government "investigations"—regardless of the outcome thereof—and if private plaintiffs are to be supplied with evidence from government investigations, private plaintiffs can be expected to await the results of government investigation, and the usefulness of private actions as an independent means of enforcement of the act will thus be diminished. Of course, it is also true that such a rule would forfeit a major present inducement to respondents in Commission proceedings to accept consent decrees.

Thus, the decisions below have exposed a number of serious anomalies all pertinent to antitrust enforcement policies. Other questions naturally arise:

Is it not also anomalous that the sanctions which a defendant faces when the Justice Department elects to proceed criminally under the Clayton Act are far more drastic than those which the Commission may impose under that Act?

Is it not also anomalous that the "civil proceeding" brought "by the United States" must now be carefully distinguished throughout Section 5 from "action or proceeding . . . by the United States under Section 4A" or are we to understand that the FTC has now acquired jurisdiction under Section 4A to sue for single damages?

Finally, is it not at least ironic, if not anomalous, that the courts below so drastically extended Section 5 to

rescue an indolent plaintiff after Congress had at long last provided a Federal four-year statute of limitations designed mostly to put such actions to rest but also in part to reduce the "time to procrastinate and delay" hitherto attendant upon treble damage litigation? Note Mr. Keating's remarks, *supra*, page 37.

Some of these questions have been debated in Congress over the years, yet, significantly, Section 5 has never been amended in any substantive aspect since its original enactment in 1914. We submit, therefore, that it is for Congress and, with all respect, for Congress alone to formulate specific policies of antitrust enforcement. Cf. *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953); *United States* v. *Cooper Corp.*, 312 U. S. 600, 605-6 (1941).

III

In any event Section 5 cannot serve to rescue plaintiff's Sherman Act claims.

Section 5 suspends the statute of limitations only with respect to private rights of action "based in whole or in part on any matter complained of" in the government proceeding. The Court below virtually read this limitation out of Section 5(b) altogther in ruling that the suspension of limitations because of an FTC complaint based solely on the Clayton Act, Section 7, extended as well to plaintiff's conspiracy and attempted monopoly allegations under Sections 1 and 2 of the Sherman Act.

Tolling is to be "strictly construed" and, if available at all, its extent is to be determined by a comparison of the issues tendered in the government suit with those in the related private action. *Leh* v. *General Petroleum Corp.*, 208 F. Supp. 289, 294 (S. D. Cal., 1962) aff'd. 330 F. 2d

288 (9th Cir., 1964); certiorari granted on the point at issue, U. S. , 13 L. Ed. 2d 85 (to be argued this Term, No. 348); see, also *Tague* v. *Balaban*, 146 F. Supp. 356 (N. D. Ill., 1956). The general rule developed in this process has been that the tolling provision "cannot be extended to matters which might have been but were not complained of by the United States. It is restricted to matters actually complained of. The general rules of collateral estoppel apply." *Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190, 196 (9th Cir., 1956).

For instance Judge Wyzanski was certainly of this view when he held in *Momand* v. *Universal Film Exchange, supra,* 43 F. Supp. at 1012, that a suit by the United States charging a Section 7 violation did *not* toll the statute of limitations for a private plaintiff relying on Sherman Act allegations. The Court was just "not impressed" with the argument that the government action had been broadly tailored to prevent monopoly in the motion picture industry.

In *Steiner,* conspiracies to monopolize the exhibition of motion pictures generally and first run pictures in particular were claimed to be the same conspiracy complained of in *United States* v. *Paramount,* 334 U. S. 131 (1948). Following the interpretation of the tolling provision by Judge Wyzanski in *Momand,* the Ninth Circuit held:

> "General allegations of conduct in violation of the antitrust laws unrelated to the same conduct alleged in a public suit are insufficient to toll the running of a statute of limitations. A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." 232 F. 2d at 196.

While the *Steiner* and *Momand* plaintiffs at least alleged the same "right of action", *i.e.* a Sherman Act con-

spiracy, as did the plaintiff in *Union Carbide & Carbon Corp.* v. *Nisley, supra*, the authority cited by both courts below, comparison of the amended complaint in this action (R. 48a-55a) with the FTC's complaint in Docket 7973 (R. 15a-26a) demonstrates that the FTC, in marked contrast to the allegations at bar, put no reliance whatsoever on the Sherman Act. On the contrary, the FTC complaint throughout closely paraphrased Section 7 of the Clayton Act in its claims that the cumulative effect of all acquisitions there cited "may be substantially" to lessen competition or "tend to create a monopoly" in the manufacture, distribution and sale of electrical insulation products (R. 25a). Surely this is hardly "virtually identical" to plaintiff's charges here that the IWI acquisition was effected pursuant to a conspiracy between 3M and Essex formed in 1956 to restrain trade in an attempt by those defendants to monopolize the electrical insulation industry. Cf. *Philco Corp.* v. *R.C.A.*, 186 F. Supp. 155, 159 (E. D. Pa., 1960).

That the "matters complained of" are necessarily—and essentially—different where the theory of antitrust liability differs is particulary obvious when Sherman Act standards are compared with those of Section 7 of the Clayton Act.

The Sherman Act is predicated upon an actual, present "restraint of trade of commerce" (Section 1) or monopolization of "any part of the trade or commerce" (Section 2) whereas Section 7 undertakes to prohibit acquisitions of stock or assets where the effect in any section of the country "may be substantially to lessen competition, or to tend to create a monopoly." Cf. *Momand* v. *Universal Film Exchange, supra.*

Plaintiff here, for reasons sufficient unto itself, has voluntarily charged that 3M—through conspiracy with

Essex Wire—fomented an actual restraint of trade and monopolized commerce in electrical insulation materials in violation of the Sherman Act. In marked contrast, the FTC, by alleging only a Section 7 violation, apparently considered that no actual restraint of trade or monopoly had resulted from 3M's acquisition of the IWI assets. Of course, a private plaintiff is not precluded from attempting to prove that an actual, present restraint resulted from an acquisition to his damage, but he cannot contend that such an actual, present restraint was a "matter complained of" in an FTC antimerger complaint within the intendment of Section 5. Cf. *Steiner* v. *20th Century-Fox Film Corp., supra.*

United Banana Company v. *United Fruit Company,* 172 F. Supp. 580 (D. Conn., 1959) illustrates the point that, irrespective of a coincidence of factual allegations, different theories essentially mean different "matters complained of." There the private complaint first alleged a conspiracy and an attempt to monopolize the distribution of bananas with additional counts charging violations of the Robinson-Patman Act by price discriminations against jobbers. Previously a suit by the United States based on the same conspiracy theory had also vaguely alleged that the defendant interfered with independent jobbers "by other means". The Court held that, while count one of the private complaint was tolled during pendency of the government's suit based upon the same conspiracy and monopoly charges, the Robinson-Patman counts were not tolled. Nor was the allegation in the government suit that defendant had interfered "by other means" sufficiently precise to toll plaintiff's later Robinson-Patman allegations.

Similarly, it is manifest that "not every violation of § 7 . . . would necessarily be a violation of the Sherman

Act." *U. S.* v. *The Philadelphia National Bank, supra,* 374 U. S. at 355 (1963); *Times-Picayune Publishing Co.* v. *U. S.,* 345 U. S. 594, 609-610 (1953) See, also, *U. S.* v. *Aluminum Co. of America,* 377 U. S. 271 (1964) citing *Brown Shoe Co.* v. *U. S.,* 370 U. S. 294, 323 (1962).

The contrary contention made by plaintiff here and involving the same statutory sections was squarely rejected in *Gottesman* v. *General Motors Corporation,* 221 F. Supp. 488 (S. D. N. Y., 1963), cert. den. ——U. S.——, 13 L. Ed. 2d 88 (1964) and the rule enunciated in Judge Wyzanski's *Momand* decision and in *United Banana* was invoked in a clear holding that the Clayton and Sherman Acts comprehend intrinsically different matters.

> "It seems too obvious to require discussion that facts on which a finding of a violation of the Clayton Act is based are insufficient to support a finding of a violation of the Sherman Act, since the Clayton Act was intended to catch potential Sherman Act violations in their incipiency. 'Incipiency' denotes 'any time when the acquisition threatens to ripen into a prohibited effect.' United States *v.* E. I. duPont de Nemours & Co., supra, 353 U. S. at 597, 77 S. Ct. at 879, 1 L. Ed. 2d 1057." (P. 492).

Plaintiff's argument is almost one of necessity since there is nowhere a citable instance of a treble damage recovery predicated upon Section 7 of the Clayton Act. It has long been respectable opinion among antitrust practitioners that Section 7 provides no basis for and cannot sustain a treble damage claim. In *Gottesman,* it has now been squarely held that, since private litigants cannot fairly claim to have been damaged by the *potential* restraints of commerce or *tendencies* toward monopoly against which Section 7 inveighs "[t]here can be no claim for money damages for a violation of Section 7." 221 F.

Supp. at 493. See, also, *Highland Supply Corp.* v. *Reynolds Metals Company, supra,* 327 F. 2d at 728, n. 3.

The relevancy of "the matter complained of" becomes most acute in the present context since obviously, if this litigation proceeds, plaintiff will eventually have to face up to this question directly. If we are correct in our assumption of the law, plaintiff must forego Section 7 altogether and stand solely on the Sherman Act with its heavier proof requirements and an obvious dearth of the requisite overt acts within the four-year damage period. This being so it is fair to ask now—and directly—whether the FTC proceeding against 3M was in any respect intended or designed "to prevent, restrain, or punish violations of" the Sherman Act so as to suspend or toll the limitations otherwise applicable to plaintiff's Sherman Act allegations?

A negative answer follows upon a reading of the FTC's explicit complaint (R. 15a-28a) since clearly the Commission was concerned—as is Section 7 itself—solely with potential damage to competition and not with the random impact, however grievous, upon any particular entity claiming to be a competitor. As this Court emphasized in *Brown Shoe, supra,* 370 U. S. at 320:

> "Taken as a whole, the legislative history [of Section 7] illuminates congressional concern with the protection of *competition,* not *competitors,* and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." (Emphasis by the Court.)

A comparison of the factual allegations of the two complaints clearly shows that the similarity in "matters complained of" is far more apparent than real. Indeed, the only point of reference common to both complaints is the acquisition by 3M from Essex Wire of the IWI assets in August, 1956. To the FTC this was merely the

final step in a series of acquisitions which, taken together, warranted the conclusion that 3M's "acquisitions, acts and practices" (all in the plural) violated Section 7. New Jersey Wood's Sherman Act charges, however, start where the FTC left off. According to its complaint, the IWI acquisition marked the formation of a conspiracy which, at the point IWI ceased to purchase New Jersey Wood's products in January, 1957, directly injured plaintiff in the conduct of its business.

Thus, the two complaints relate to two different periods of time. The FTC complaint deals with the years 1952 through 1956 ending with the acquisition in suit; on the other hand the time span in plaintiff's complaint begins with August, 1956, the date of origination of the conspiracy according to plaintiff, and proceeds to describe later acts furthering the alleged conspiracy.

There are many instances in which a significant difference in the time span covered by the two proceedings has precluded the tolling of limitations. Most recently in *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.*, 315 F. 2d 449 (1st Cir., 1963), cert. den., 375 U. S. 820 (1963), the Court held that a private plaintiff could not rely upon a conspiracy proved by the government to toll the statute of limitations where the proof in the government's case had been closed eighteen months before the start of plaintiff's damage period. See also *Park Neponent Corp.* v. *Smith*, 258 F. 2d 452 (1st Cir., 1958); *Orbo Theatre Corp.* v. *Loew's Inc.*, 156 F. Supp. 770 (D.D.C., 1958), aff'd 261 F. 2d 380 (D. C. Cir., 1958) cert. den. 359 U. S. 411 (1958); *Paramount Film Distributing Corp.* v. *Village Theatre, Inc.*, 228 F. 2d 721 (10th Cir., 1955); *Hillside Amusement Co.* v. *Warner Bros. Pictures Distributing Corp.*, 224 F. 2d 629 (2d Cir., 1955); *Charles Rubenstein, Inc.* v. *Columbia Pictures*

Corp., 176 F. Supp. 527 (D. C. Minn., 1959); *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 133 F. Supp. 839 (S. D. N. Y., 1955).

Similarly in our case, every act alleged by plaintiff to have furthered the conspiracy (and the attempt to monopolize) occurred *after* the time period covered by the FTC complaint except for the IWI acquisition in August, 1956. And that acquisition is not available as a foundation for a "right of action" based on conspiracy because no such conspiracy was complained of by the FTC.

It could hardly be more clear that (a) a multilateral conspiracy (b) resulting in an actual restraint of trade or a present monopoly (c) to the personal damage (d) of a competitor (e) which was first felt in January, 1957, present legal and factual issues so far removed from (f) a four-year series of acquisitions ending in August, 1956, (g) where the effect may be "substantially to lessen competition, or to tend to create a monopoly" as to wholly defy comparison.

Thus, quite apart from the novel and unique extension of Section 5 to regulatory agency proceedings, it appears that the courts below have seriously obscured, if not virtually eliminated, an important limitation on the scope of Section 5(b) in conflict with numerous decisions to the contrary. Surely the FTC's Clayton Act proceeding against 3M in Docket 7973 could, in no event, serve to toll or extend limitations otherwise applicable to plaintiff's charges of Sherman Act violations.

Conclusion

The decisions below extend the coverage of Section 5 so far beyond the ascertainable ken of Congress as to represent a clear and wholly unwarranted invasion of the legislative province.

With neither legislative history nor considered judicial or professional opinion providing any support and in view of the Constitutional implications involved in converting the results of administrative proceedings and procedures to prima facie evidence by statutory fiat, it is submitted that the decision below should be, in all respects, reversed and the amended complaint insofar as it propounds liability for any act occurring prior to November 20, 1957, dismissed, as barred by Section 4B of the Clayton Act.

Respectfully submitted,

SIDNEY P. HOWELL, JR.,
230 Park Avenue,
New York, New York.

CHARLES C. TRELEASE,
744 Broad Street,
Newark, New Jersey,
Attorneys for Petitioner-Defendant.

PAUL J. QUINN
EDWIN E. MCAMIS,
REGAN GOLDFARB POWELL
& QUINN,
New York, New York,

THOMAS J. LYONS,
St. Paul, Minnesota.
Of Counsel.

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No. 291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

v.

NEW JERSEY WOOD FINISHING COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF HIGHLAND SUPPLY CORPORATION AS AMICUS CURIAE

ALEX AKERMAN, JR.,
THOMAS A. ZIMMERTH,
1366 National Press Bldg.,
Washington, D.C., 20004,

JOHN C. KAPPEL,
ROBERT E. STAED,
518 Title Guarantee Bldg.,
706 Chestnut Street,
St. Louis, Missouri, 63101

Attorneys for Highland Supply Corporation

Of Counsel:

SHIPLEY AKERMAN & PICKETT
1366 National Press Bldg.
Washington, D.C., 20004

KAPPEL & NEILL,
518 Title Guarantee Bldg.
706 Chestnut Street
St. Louis, Missouri, 63101

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 291

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Petitioner,

v.

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MOTION OF HIGHLAND SUPPLY CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Highland Supply Corporation, by its attorneys, respectfully moves for leave to file the annexed brief *amicus curiae* in this case. The consent of the attorneys for respondent has been obtained. Petitioner's attorneys have declined to consent but have stated by letter that they do not "expect to object" to the granting of this motion.

Highland Supply Corporation is directly interested in this case because it is the plaintiff in a treble-damage action now pending in the United States District Court for the Eastern District of Missouri, *Highland Supply Corporation* v. *Reynolds Metals Company,* Civil Action

No. 63 C 53(2), in which exactly the same issue to be determined in this case is presented *i.e.* whether a proceeding before the Federal Trade Commission tolls the four-year statute of limitations under Sec. 5(b) of the Clayton Act, 15 U.S.C. Sec. 16(b). The United States Court of Appeals for the Eighth Circuit in *Highland Supply Corporation* v. *Reynolds Metals Company*, 327 F. 2d 725 (1964), while remanding the case to the District Court on other grounds, decided this issue contrary to the holding of the United States Court of Appeals for the Third Circuit in the instant case thereby creating a direct conflict between the two circuits.

Upon remand movant here filed an amended complaint in the District Court and defendant, Reynolds Metals Company filed a motion to dismiss which was denied in part and granted in part on February 5, 1965.[1]

If this Court affirms the Third Circuit holding in the instant case it will, of course, have the effect of nullifying the conflicting portions of the Eighth Circuit's holdings thereby increasing movant's potential recovery. Movant, therefore, has a direct monetary interest in the decision of this case.

On January 2, 1965 Reynolds Metals Company filed its Motion for Leave to File a Brief *Amicus Curiae* accompanied by its brief in which it seeks, *inter alia*, to broaden the scope of inquiry in the instant case by including a consideration of the issue of whether an order of the Federal Trade Commission may be introduced as *prima facie* evidence under Section 5(a) of

[1] Highland will, of course, seek reconsideration of the *tolling* and *prima facie* questions if this Court affirms the Third Circuit's holdings in the instant case.

the Clayton Act (15 U.S.C. Sec. 16(a)), and the relationship between Sections 5(a) and 5(b).

Movant contends *inter alia,* (1) that an order of the Federal Trade Commission, particularly if it is judicially enforced by a United States Court of Appeals, *is* available to a plaintiff as *prima facie* evidence of a violation of the antitrust laws under Section 5(a) of the Clayton Act, as amended, (2) That the tolling provisions of Sec. 5(b) are separate and independent of the considerations which govern the admissibility of such an order under Sec. 5(a), and (3) Therefore, the arguments introduced by Reynolds Metals Company with respects to Section 5(a) are without merit.

WHEREFORE, Highland Supply Corporation prays that this Court enter its order granting leave to file the attached brief.

Respectfully submitted,

ALEX AKERMAN, JR.,
THOMAS A. ZIEBARTH,
1366 National Press Bldg.
Washington, D. C., 20004,

JOHN C. KAPPEL,
ROBERT E. STAED,
518 Title Guarantee Bldg.
706 Chestnut Street,
St. Louis, Missouri, 63101

Attorneys for Highland Supply Corporation

Of Counsel:

SHIPLEY, AKERMAN & PICKETT
1366 National Press Bldg.
Washington, D. C., 20004

KAPPEL & NEILL
518 Title Guarantee Bldg.
706 Chestnut Street
St. Louis, Missouri, 63101

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BRIEF OF HIGHLAND SUPPLY CORPORATION AS AMICUS CURIAE

Highland Supply Corporation, with leave of this Court, respectfully presents this brief in support of the Respondent, New Jersey Wood Finishing Company.

INTEREST OF AMICUS CURIAE

The interest of Highland Supply Corporation as *amicus curiae* is set forth in the motion for leave to file this brief *amicus* to which motion this brief is attached.

STATUTES INVOLVED

The Clayton Act, as amended, Act of July 7, 1955, c. 283, Sec. 2, 69 Stat. 283, 15 U. S. C., Sec. 16, provides in pertinent part:

> *"Judgment in favor of Government as evidence; suspension of limitations.*
>
> (a) A final judgment or decree heretofore or hereafter rendered in any or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.
>
> (b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

15 U. S. C., § 21 (g) (1), provides:[2]

> "(g) Any order issued under subsection (b) of this section shall become final—
>
> (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section."

SUMMARY OF ARGUMENT

1. Congress, in 1959, amended the Clayton Act by making orders of the Federal Trade Commission final without recourse to further proceedings in the courts. By reason of this change a final order of the Federal Trade Commission satisfies the requirements of Section 5 (a) of the Clayton Act, as amended, and is available to a private litigant in a subsequent treble-damage action as *prima facie* evidence that defendant has violated the antitrust laws.

2. In any event, the *prima facie* and *tolling* subsections of Section 5 of the Clayton Act, as amended, are independent of each other, the former depending upon the rules of evidence and the doctrine of estoppel, the latter requiring only the pre-existence of a government proceeding, the purpose of which is to prevent, restrain, or punish violations of the antitrust laws.

3. Recourse to the legislative history of the Clayton Act is unnecessary and unwarranted in the instant

---

[2] This section was added by the 1959 amendment, Pub. L. 86-107, Act of July 23, 1959, 73 Stat. 243. Prior to this amendment, orders of the Federal Trade Commission under 15 U. S. C. 18 did not become final except upon a decree of enforcement by a Court of Appeals.

case because the language of the statutory provisions is plain on its face, and because most of the legislative history refers to sections of the Act which have since been replaced.

ARGUMENT

The 1959 Finalization Amendment to the Clayton Act has Cured the Objections Previously Raised by the Courts in Declining to Permit a Federal Trade Commission Order to be Introduced as Prima Facie Evidence in a Subsequent Private Treble-Damage Action.

Congress, in 1959, amended the Clayton Act by radically increasing the legal thrust of an order of the Federal Trade Commission. Public Law 86-107, Act of July 23, 1959, 73 Stat. 243. 15 U.S.C. 21(g)(1). This amendment provided that Clayton Act orders issued by the Commission "shall become final" when the time for seeking judicial review has expired i.e. 60 days. Accordingly, any case predating this amendment necessarily must look upon an F.T.C. order as lacking finality. Only a handful of reported cases touch upon this point and they are discussed below.

The first two decisions worthy of mention in connection with the *prima facie* evidence section are *Proper* v. *John Bene & Sons* (E. D.—N. Y., 1923), 295 F. 729, and *Brunswick-Balke-Collender* v. *American B&B Corp.* (C. A.—2, 1945), 150 F. 2d 69. In each of these cases there was an attempt to utilize an order of the Federal Trade Commission as *prima facie* evidence that there had been a violation of the antitrust laws.

In *Proper, supra,* the actual ruling of the Court was based on the fact that the only one of the defendants was before the FTC in the earlier proceeding. By way of *dicta* the Court laid down six criteria which it said had to be met in order to make the prior govern-

ment proceedings competent evidence in private antitrust damage cases.

One requirement was that the proceeding must be brought under the antitrust laws. In *Proper* the FTC proceeded under the Federal Trade Commission Act—not one of the antitrust laws. Another requirement was that the prior judgment or decree must be final. At the time of *Proper,* no FTC order became "final" until judicially enforced by a Circuit Court of Appeals. The law was changed in 1959, and Clayton Act orders of the FTC become final without judicial enforcement.

The Court in *Proper* also expressed doubt as to whether the language of the statute, "suit or proceeding in equity", as it existed in 1923, included a Federal Trade Commission proceeding.

Congress broadened this language in the 1955 amendment to "any civil or criminal proceeding." Even before this amendment, however, the doubts of the District Court in *Proper* were resolved by its own Court of Appeals. In its original opinion in *Brunswick-Balke, supra,* it held that an order of the Federal Trade Commission issued in a Clayton Act case was *prima facie* evidence of a violation of the law and admissible in a subsequent private damage suit, thus holding a Federal Trade Commission proceeding to be within the scope of Section 5. The Court on rehearing reversed itself solely because of its original misinterpretation of the 1938 amendment to the Federal Trade Commission Act which made orders under Section 5 of the Federal Trade Commission Act final. Clayton Act orders still were not final until Congress, in 1959, amended the Clayton Act.

There seems little doubt that if the 1959 amendment had been in effect at the time of the *Brunswick-Balke* case, the court's original decision would have stood, turning as it did solely on the question of "finality" of F. T. C. orders under the Clayton Act.

In *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 349 (D. C.-Mass., 1950), the construction of Section 5 (a) and (b) was not before Judge Wyzanski. The question before the Massachusetts Court was the introduction of hearsay testimony. There was no question as to the introduction of a prior decree as *prima facie* evidence, nor of the tolling of the statute of limitations.

There is *dicta,* however, to the effect that the only difference between a decree of a district court and an order of the Federal Trade Commission is that the Commission's order cannot be used as *prima facie* evidence in a private treble damage suit.

Judge Wyzanski was speaking in 1950, prior to the 1955 amendments to Sections 5 (a) and (b) and the 1959 amendment "finalizing" the Clayton Act Orders in Federal Trade Commission proceedings. At the time of this opinion Judge Wyzanski was correct in his construction of Section 5 (a) because it required a *final* judgment or decree and Clayton Act orders in Federal Trade Commission proceedings were not final until 1959.

The following language of the Court is significant:

> "There is no difference between the substantive antitrust law applied by the Commission, and that applied by the Court. In a civil antitrust case the Government has the unfettered choice of going before a Commission or before the Court without a jury." (emphasis by the Court).

From the above quotation it is clear that Judge Wyzanski is of the opinion (1) that even prior to the 1955 amendment a proceeding before the Federal Trade Commission was a civil proceeding, and (2) that it was brought by the United States.

Similarly in *Wright* v. *Carter Products* (CA-2, 1957), 244 F. 2d 53.

The question of the construction of Sections 5 (a) (b) was not before the Court. Again, this case was decided in 1957 prior to the "finalizing" amendment of 1959. Furthermore, the Federal Trade Commission proceeding involved false advertising under Sec. 5 of the Federal Trade Commission Act and not a violation of the antitrust laws.

The Court held that the order of the Federal Trade Commission *could* be used as evidence of defendant's knowledge. By footnote, it was stated that the evidence was admitted only on the issue of notice, not as evidence of the product's propensities.

The *International Tag & S. Co.* v. *American Sales Book Co.* (S. D.-N. Y., 1943), 6 FRD 45, decision turned on the fact that the Federal Trade Commission Order was based on a consent decree, and because the prior Commission complaint was directed against law violations which occurred prior to the time the plaintiff in the treble damage action became a competitor. Since the Federal Trade Commission proceeding was disposed of by means of a consent order, it is obvious that it could not be used in evidence in a subsequent private treble damage suit.

Thus, the only Court of Appeals decisions which have considered the effect of Federal Trade Commis-

sion Orders since 1959 are *Highland Supply Corporation* v. *Reynolds Metals Company,* (CA-8, 1964) 327 F. 2d 725, and the instant case.

The Prima Facie and Tolling Subsections of the Clayton Act Are Independent of Each Other.

Sections 5 (a) and 5 (b) of the Clayton Act (15 U. S. C. 16 (a) and 16 (b), respectively) are complementary, but not necessarily co-extensive in their frame of reference. In *Union Carbide and Carbon* v. *Nisely* (C. A.—10, 1963), 300 F. 2d 561, the Court on page 569 said:

> "(1) The two paragraphs are indeed complementary and should be construed together. See: *Sun Theatre Corp.* v. *RKO Radio Pictures,* 7 Cir., 213 F. 2d 284; *Fifth & Walnut, Inc.* v. *Loew's Inc.,* 2 Cir. 176, F. 2d 587, 593. But, we do not think they are necessarily co-extensive in their frame of reference. The purpose of the first paragraph of Section 5 was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions;' and to that end 'to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit. *Emich Motors Corp.* v. *General Motors,* 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534.'
>
> "The corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the intended benefits of related government proceedings by suspending the running of the statute of limitations until the termination of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit. The competency of a government judgment in a private suit is necessarily restricted

to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited."

The differences between Sections 5(a) and 5(b) of the Clayton Act are obvious.

There are many situations where 5 (b) should be applied even though (a) would be inapplicable. For example, if the decree is based on a consent settlement, by its specific terms, Section 5 (a) is not applicable but still the statute of limitations would be tolled during the pendency of the proceedings. Likewise, in a criminal prosecution, if the result is an acquittal of the defendant, certainly the judgment could not be introduced as *prima facie* evidence of violation of the antitrust laws, still the statute of limitations would be tolled during the criminal proceedings.

I. Extensive Resort to the Legislative History of the Clayton Act Is Both Unnecessary and Unwarranted in Construing the Issues Presented in This Case.

Petitioner, and Reynolds Metals Company, as *amicus curiae,* have interlarded their respective briefs with extensive references to selected excerpts from the Legislative History of the Clayton Act of 1914. Much of this material is necessarily is restricted to the original language of the Calyton Act. The all-important 1955 and 1959 amendments effected changes which, in your *amicus'* view, are far more meaningful than historical observations about statutory language which has since been replaced.

Petitioner would dismiss the 1955 amendment to the Clayton Act as a mere modernization of language to conform to the terminology used in the Federal Rules

of Civil and Criminal Procedure. Even a casual examination of the sections in question will reveal that the 1955 amendment broadened the scope of coverage by the plain meaning of its language without reference to extrinsic sources of statutory construction.

Moreover, a legislative history so vast as that which resulted in the Clayton Act and its various amendments becomes a hopeless jumble from which any litigant can derive solace if he looks long enough.

For example, Reynolds' reference to the letter of Edward R. Johnson, Chairman of the American Bar Association Committee, and the testimony of Mr. Kenneth Royall[1] weakens its argument rather than strengthens it. In submitting testimony concerning proposed legislation, which ultimately became the 1955 amendment to Section 5 of the Clayton Act, both Mr. Johnson and Mr. Royall raised the question that this legislation might be construed as including Federal Trade Commission proceedings, and requested that the proposed legislation be amended so as to specifically exclude Federal Trade Commission proceedings. Notwithstanding this request, Congress enacted legislation without excluding Federal Trade Commission proceedings. This omission is particularly illuminating, in view of the fact that Section 5 (a) does contain two specific exclusions, and Section 5 (b), one.

It is significant that Congress, knowing of this view, refrained from excluding proceedings before the Federal Trade Commission, even though Congress *did* provide that judgments or decrees entered in actions under section 15a could not be used as *prima facie* evidence.

---

[1] Reynolds Metals Company's Brief as Amicus Curiae, pp. 59-62.

The only exceptions to the use of final judgments or decrees set out in 15 USC 16 (a) are:

> "(1) Consent judgments or decrees entered before any testimony has been taken," and
>
> "(2) Judgments or decrees entered in actions under Section 15 (a) of this title."

The second exclusion is also specifically set out in Section 15 (b).

Under the maxim, *Expressio unius est exclusio alterius,* it should be concluded that Congress intended to exclude *only* these two classes of judgments or decrees. This principle is particularly applicable where, as here, the legislative history clearly shows that Congress was on notice as to the possible effect of the change in language. *So. Coast Corp.* v. *Sinclair* (CA-5, 1950), 181 F. 2d 960, 961; *Midland Corp.* v. *Ickes* (CA-8, 1942), 125 F. 2d 618, 625.

Furthermore, the reports, hearings and debates are replete with the words "government proceedings," and are not limited to suits by the Attorney General and refer to "benefits of the government proceedings" and are not limited to the one benefit of the use of the decree as *prima facie* evidence.

The Courts are loath to consider legislative history as an aid to statutory construction, except as a last resort. Judge Hulen, in the case of *Securities and Exchange Commission* v. *Ralston Purina Co.* (E. D. Mo., 1952), 102 F. Supp. 964, said:

> "We are urged to follow these extra-statutory pronouncements in determining the meaning of the statute. The practice does not appeal to us. We think it should be resorted to only in cases of extreme necessity when the recognized rules for

statutory construction fail of their purpose. Language used by Congressional Committees is often loose. That observations of Congressional Committees will thereafter be used by the Courts to determine the meaning of laws passed by Congress cannot be said to have been in the minds of the Committee at the time of their pronouncements. Congress does not purposely pass a vague law" (966-67).

Mr. Justice Jackson joined by Mr. Justice Minton in the case of *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 386, (1951), stated:

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political contro-

versies which are quite proper in the enactment of a bill but should have no place in its interpretation.

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

By and large, I think our function was well stated by Mr. Justice Holmes: 'We do not inquire what the legislature meant; we ask only what the statute means.' Holmes, *Collected Legal Papers*, 207. See also *Soon Hing* v. *Crowley*, 113 U. S. 703, 710-711. And I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us" (pp. 395, 396 and 397).

In view of the foregoing, we submit that recourse to legislative history is both unnecessary and unwarranted in the instant case.

CONCLUSION

The decision of the Third Circuit is completely sound and represents a natural and inevitable progression in the development of private enforcement of the antitrust laws. It should be affirmed.

Respectfully submitted,

ALEX AKERMAN, JR.,
THOMAS A. ZIEBARTH,
1366 National Press Bldg.
Washington, D. C., 20004,

JOHN C. KAPPEL,
ROBERT E. STAED,
518 Title Guarantee Bldg.
706 Chestnut Street,
St. Louis, Missouri, 63101

Attorneys for Highland Supply Corporation

Of Counsel:

SHIPLEY, AKERMAN & PICKETT
1366 National Press Bldg.
Washington, D. C., 20004

KAPPEL & NEILL
518 Title Guarantee Bldg.
706 Chestnut Street
St. Louis, Missouri, 63101

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Certiorari Granted on October 19, 1964

BRIEF FOR RESPONDENT

ALBERT G. BESSER,
Attorney for Respondent-Plaintiff,
744 Broad Street,
Newark 2, New Jersey.

ALBERT G. BESSER,
RALPH M. LOWENBACH,
HANNOCH, WEISMAN, MYERS,
STERN & BESSER,
Newark 2, New Jersey,
Of Counsel.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 291

MINNESOTA MINING & MANUFACTURING COMPANY,
Petitioner-Defendant,

vs.

NEW JERSEY WOOD FINISHING COMPANY,
Respondent-Plaintiff.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Certiorari Granted on October 19, 1964

Counter-Statement of Questions Presented

1. (a) Does not an FTC proceeding based on violations of section 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 18 suspend the statute of limitations, section 4b of the Clayton Act, 69 Stat. 283, 15 U.S.C. Sec. 15b, applicable to a private litigant's causes of action under section 7 of the Clayton Act and sections 1 and 2 of the Sher-

man Act, 26 Stat. 209, 15 U.S.C. secs. 1 and 2, against the defendant in the FTC proceeding?

(b) Is not such a proceeding as much a "proceeding . . . instituted by the United States" to enforce the antitrust laws for purposes of the tolling statute, section 5(b) of the Clayton Act, 69 Stat. 283, 15 U.S.C. Sec. 16(b), as one instituted by the Department of Justice?

2. Are the *only* proceedings which toll the statute of limitations in antitrust cases under section 5(b) those which give birth to a final judgment or decree which by reason of section 5(a) of the Clayton Act, 69 Stat. 283, 15 U.S.C. sec. 16(a), is *prima facie* evidence against the same defendant in subsequent private antitrust litigation?

(a) Assuming that the answer to the foregoing question is in the affirmative, does not an FTC proceeding under the Clayton Act give rise to a determination which may be used as *prima facie* evidence in a subsequent private suit based on violation of the antitrust laws?

3. Does not a proceeding instituted by the United States under the Clayton Act suspend the statute of limitations applicable to a claim under the Sherman Act, predicated upon the very same facts?

Counter-Statement of the Case

This is a private antitrust suit brought by New Jersey Wood Finishing Company against Minnesota Mining & Manufacturing Company ("3M") and Essex Wire Corp. ("Essex") based on violations of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act, 26 Stat. 209, as amended, 15 U.S.C. Secs. 1 and 2; 38 Stat. 731, as amended, 15 U.S.C. Sec. 18. Presented for review under Writ of Certiorari is the unanimous opinion of the

United States Court of Appeals for the Third Circuit (R. 69) that because of the pendency of an FTC proceeding against 3M from June 1960 to August 1961 the statute of limitations, Sec. 4b of the Clayton Act, 69 Stat. 283, 15 U.S.C. Sec. 15b, was tolled and plaintiff's complaint timely filed.

By complaint dated June 24, 1960 (R. 14a), the United States of America, through the FTC, charged defendant 3M with a violation of section 7 of the Clayton Act, alleging that recent acquisitions by 3M in the electrical insulation field resulted in "the *actual* or potential lessening of competition" in that industry (R. 15a) (emphasis supplied). The government complaint recited a consistent pattern of past acquisitions by 3M in the industry, and then alleged as one wrongful acquisition 3M's purchase from Essex in August, 1956 of Insulation and Wires, Inc. ("I.W.I."), formerly one of the leading independent distributors of electrical insulation products (R. 20a). The FTC proceeding was terminated on July 19, 1961 by the entry of a consent order, under the terms of which 3M agreed to divest itself of I.W.I. (R. 29a).

Thereafter, on November 20, 1961, respondent filed its complaint in this matter (R. 5a). Subsequently an amended complaint was filed (R. 48a). The amended complaint sets forth three causes of action. It is brought under section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 15, for treble damages on account of violations by 3M and Essex of sections 1 and 2 of the Sherman Act, and section 7 of the Clayton Act. The substance of plaintiff's cause of action under the Clayton Act is the acquisition by 3M of I.W.I. The Sherman Act violations are grounded in conspiracy manifested by continuing overt, wrongful acts (R. 51a) commencing with the date of 3M's acquisition of I.W.I. and continuing until the time of the filing of the complaint. Specifically, the acts complained of are:

1. The acquisition of I.W.I. from Essex by 3M;
2. The control of I.W.I. by 3M to prevent the former from distributing plaintiff's products;
3. The control of I.W.I. by 3M to insure that the former purchased certain goods from 3M's subsidiary, Irvington Varnish and Insulator Company, to the exclusion of a similar line of goods manufactured by plaintiff;
4. The control of I.W.I. by 3M to effect tie-in sales of electrical insulation products and other 3M manufactures;
5. The arrangement between the defendants to have Essex deal only with I.W.I. in purchasing electrical insulation products to the exclusion of competitive distributors handling plaintiff's products.

Defendant moved for summary judgment against the plaintiff on the ground that plaintiff's causes of action are barred by the statute of limitations. This motion was denied by the Honorable Anthony T. Augelli, U.S.D.J. (R. 56a) and an appeal was taken to the United States Court of Appeals for the Third Circuit (R. 68a).

In an opinion (R. 69) filed May 20, 1964, Circuit Judge McLaughlin, writing for a unanimous court comprised of himself, Chief Judge Biggs, Jr. and Circuit Judge Hastie, affirmed the opinion of Judge Augelli.

Both courts below held that the FTC proceeding was a "civil proceeding . . . instituted by the United States" within the meaning of section 5(b) of the Clayton Act (R. 63a; 90). Therefore, the statute of limitations was tolled during the time that the proceeding was pending.

The District Court (R. 65a) and the Court of Appeals (R. 92) also agreed that, since there was common identity of fact between the allegations underlying the Clayton Act proceeding by the FTC and plaintiff's Sherman Act allegations, the statute of limitations was tolled with respect to plaintiff's Sherman Act cause of action as well as with respect to plaintiff's claim based on a violation of section 7 of the Clayton Act.

These eminently correct decisions recognize and further the vital role which private damage suits play in the enforcement of the antitrust laws of the United States, and should be affirmed in all respects.

Summary of Argument

None of plaintiff's causes of action is barred by the statute of limitations of the Clayton Act. Section 5(b) of the Clayton Act operated to toll the statute of limitations during the pendency of the FTC proceeding against the petitioner.

The tolling provision (section 5(b)) is broader than the *prima facie* evidence provision (section 5(a)) and considerations regarding *prima facie* evidence are irrelevant to this litigation. An FTC proceeding under the antitrust laws clearly tolls the statute of limitations. Such a proceeding under the Clayton Act is a "proceeding . . . instituted by the United States" within the meaning of section 5(b).

The 1914 legislative history is not helpful in this analysis. Since that time Congress has expanded the jurisdiction of the FTC. The procedures of the FTC are analogous to those of a court of equity.

Even assuming that section 5(a) in some way defines the meaning of section 5(b), there is no merit, either in con-

stitutional doctrine or public policy to the argument of petitioner that an FTC proceeding under the Clayton Act does not come within section 5(a).

Since the FTC proceeding against petitioner dealt with the same "matters complained of" in the complaint herein, the statute of limitations was tolled with respect to respondent's Sherman Act causes of action as well as with respect to its cause of action based on the Clayton Act.

ARGUMENT

POINT I

Respondent's cause of action against 3M, based on Section 7 of the Clayton Act, is not barred by the Statute of Limitations which was tolled by the Federal Trade Commission proceeding.

Section 4b of the Clayton Act, 69 Stat. 283, 15 U.S.C.A. Sec. 15b provides a four-year statute of limitations on private actions arising out of violations of the antitrust laws. This section is modified by a tolling provision, section 5(b) of the Clayton Act, 69 Stat. 283, 15 U.S.C.A. Sec. 16(b), which reads:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of

limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Therefore, if the FTC proceeding instituted against 3M (R. 14a) is within the contemplation of the tolling section, plaintiff's Clayton Act cause of action against 3M survives any attack based on the statute of limitations, since it was commenced within one year of the termination of the FTC proceeding, complains only of matters occurring within four years prior to the filing of the FTC complaint, and "is based in whole or in part" on matters complained of in the FTC proceeding.

The tolling statute, section 5(b), *supra*, is immediately preceded by another subsection, section 5(a) of the Clayton Act, 69 Stat. 283; 15 U.S.C. Sec. 16 (a), making final judgments or decrees in anti-trust proceedings brought by or on behalf of the United States *prima facie* evidence in subsequent private suits:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before

any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

3M argues that an FTC proceeding never can toll the statute of limitations despite the fact, as will be spelled out at length below, that the FTC and the Antitrust Division of the Department of Justice have concurrent and overlapping jurisdiction to enforce the antitrust laws. The argument is predicated on an analysis of the language of the statute, its legislative history and the creation of a straw-man in the guise of an alleged constitutional prohibition against the use of FTC proceedings as *prima facie* evidence.

A. The *prima facie* evidence provision (section 5 (a)) and the tolling provision (section 5 (b)) are not co-extensive.

At the outset, it must be clearly understood that respondent in no way concedes that the *prima facie* (section 5 (a)) is involved in this litigation. This matter involves the tolling of the statute of limitations under section 5(b). Judge McLaughlin agreed that there was substantial basis for Judge Augelli's holding that the two sections should be treated as they appear in the statute book—that is, separately (R. 89, 332 Fed. 346, 359). It is true that Judge McLaughlin went on to assume that the 3M premise was correct—namely, that only a proceeding which generates *prima facie* evidence under section 5(a) serves to toll the statute of limitations under section 5(b); but this argument need not be incorporated as part of the Third Circuit's *holding*. As Judge McLaughlin stated:

"We have reached this question solely because there was some evidence in the legislative history of the section that the two subsections are to be construed to-

gether, as other courts have subsequently held. However, the decision of the court below that the two subsections should not be regarded as inter-dependent does have substantial support.

"The above mentioned intention in 1914 does not seem as plain in 1955 when Congress amended Section 5 and divided Section 5 into subsections (a) and (b). Act of July 7, 1955, c. 283, Section 2, 69 Stat. 283. The committee reports on the 1955 amendment to Section 5, plainly intimated a broader reason for tolling the statute of limitations. By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor. See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537 (1954); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U. S. 89, 102-103 (1954). The real importance of government proceedings that accrues today to private suitors is the availability to them of the government's case against the defendant. Section 5(b) enables 'a plaintiff to take advantage of facts uncovered' as a result of the government proceedings. New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co., 216 F. Supp. 507 at P. 510 (D. C. N. J. 1963). In the Senate Report on the 1955 amendment to Section 5 (b) the Committee wrote:

> 'Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages assess the strength and validity of his suit, and prepare and file his

complaint.' Senate Report No. 619, June 21, 1955, U. S. Code Cong. & Ad. News, 84 Cong. 1st Sess. P. 2332.' " (R. 89).

3M argues that the two paragraphs of section 5 must be read together; that is, that a proceeding by the United States to enforce the antitrust laws can never serve to toll the statute of limitations unless that proceeding produces a decree which is admissible as *prima facie* evidence in any subsequent private litigation against the same defendant.*

The statute does not so provide.

In *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2nd 561 (10th Cir. 1962), a private action based on a conspiracy in violation of the Sherman Act, Chief Judge Murrah considered the relationship of the tolling provi-

* As the opinions below both indicate (R. 62a; 86), 3M has heretofore overtly argued that even a proceeding brought by the Justice Department does not toll the statute of limitations whenever such a proceeding is terminated by a consent decree entered before testimony is taken. (See the proviso in Section 5(a)). This is really the logical—and absurd—conclusion of their argument that the only purpose for tolling is to generate usable evidence for a subsequent private suit. Although in their latest brief they have not explicitly stated this argument, it is there, nevertheless, although in subtler form. (See petitioner's brief, bottom of page 60). Petitioner still objects to a private litigant being able to await the outcome of a government antitrust proceeding. This construction would destroy the efficacy of section 5(b), by making it impossible for private litigant to derive the benefits Congress expressly contemplated when it created the tolling provisions. (See p. 15, *infra*). 3M would compel private parties to sue immediately even though the Federal Government, through the Justice Department or the FTC, was proceeding on the same facts for fear that the United States proceeding *might* terminate in a consent judgment after the expiration of the limitations period.

sion and the *prima facie* evidence section. While noting that the two sections are complementary, Judge Murrah, in language reproduced with pregnant omissions at pages 66-67 of petitioner's brief, recognized that the tolling provision, section 5(b), *is* broader than the *prima facie* evidence, section 5(a):

> "But, we do not think they are necessarily co-extensive in their frame of reference. The purpose of the first paragraph of Section 5 was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions'; and to that end 'to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large and advantage as the estoppel doctrine would afford had the Government brought suit.' *Emich Motors Corp.* v. *General Motors,* 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534.
>
> "The corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the intended benefits of related government proceedings by suspending the running of the statute of limitations until the termination of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit.[1] The competency of a government judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited." 300 F. 2d 569 (Footnote omitted.)

In rebuttal to respondent's argument that the two sections are not co-extensive petitioner cites (at page 58 *et.*

seq. of is brief) four decisions which are clearly distinguishable from the case at bar: *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996 (D. Mass. 1942); *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284 (7th Cir. 1959); *Samuel Goldwyn Productions* v. *Fox West Coast Theatres Corp.*, 146 F. Supp. 905 (N. D. Cal. 1956) *rev'd on other grounds* 328 F. 2d 190 (9th Cir. 1964); and *Charles Rubinstein, Inc.* v. *Columbia Pictures Corp.*, 154 F. Supp. 216 (D. Minn. 1957), *aff'd* 289 F. 2d 418 (8th Cir. 1961).

No authority was cited in *Momand* to support Judge Wyzanski's conclusion (quoted at p. 58 of petitioner's brief) as to the relationship of the two paragraphs of the then section 5. Furthermore, the facts before him were radically different from those with which we are concerned here. *Momand* involved many defendants, some of whom had been defendants in earlier antitrust proceedings brought by the United States government. Read in context, Judge Wyzanski's statement refers to the fact that the plaintiffs were asking for a tolling of the statute of limitations (1) against parties not defendants in the earlier government proceedings; or (2) in regard to causes of action involving acts or occurrences not complained of in the prior government proceedings:

> "In none of the pleadings in those proceedings [the prior governmental proceedings] is there any reference to alleged wrongs in Oklahoma [the situs of the acts complained of in *Momand*] or alleged wrongs directed specifically against the assignor of this plaintiff. In at least one case the proceedings are not only remote in place but also in time, having been begun after this suit was begun." 43 F. Supp. 996, 1011.

Judge Wyzanski never considered the case where the very act complained of in the government proceeding was

the act being complained of in a subsequent private litigation, which is the undisputed situation in the case at bar. That Judge Wyzanski, in *Momand,* considered a distinguishable fact situation is clearly pointed out in *Steiner* v. *Twentieth Century-Fox Film Corp.,* 232 F. 2d 190, 196 (9th Cir. 1946). In language immediately preceding that which is quoted at page 72 of the defendant's brief, the *Steiner* court said:

> "Momand v. Universal Film Exchange, D. C. Mass. 1942, 42 F. Supp. 996, at pages 1011, 1013 is a case in point. Judge Wyzanski ruled, in essence, that in order for the statute of limitations to be tolled for private litigants in antitrust conspiracy actions, *the matter complained of must be the same acts that achieve the same conspiracy complained of in the action brought by the United States.* We agree with this conclusion." (Emphasis supplied.)

The respondent, likewise, agrees.

The same thesis, and nothing more relevant to the instant litigation, is the rationale for the other cases cited by petitioner on the point. In *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc., supra,* at page 292, the court stated:

> "We are of the opinion that section 5 operates to toll the running of limitations during pendency of a government antitrust suit *only as to named defendants,* and that in the present case running of the Illinois statute was never tolled as to B & K by pendency of *U. S.* v. *Paramount.*" (Emphasis supplied.)

Sun Theatre Corp. also ruled:

> "The second paragraph of that section is designed to insure to injured parties *the full fruits* of the govern-

ment's case by suspending during the pendency thereof the running of the statute against a right of action in favor of parties injured by the same act." (Emphasis supplied.) page 291.

Similarly both *Samuel Goldwyn Products* v. *Fox West Coast Theatres Corp., supra,* and *Charles Rubinstein, Inc.* v. *Columbia Pictures Corp., supra,* concern attempts by plaintiffs to toll the statute of limitations against parties not involved in the earlier government proceedings. In the *Goldwyn* case the court stated:

> "A comparison of the essence of the complaint in the Paramount case with the essence of the complaint of the plaintiff here discloses two substantially different conspiracies by different sets of conspirators, for quite different objectives, and employing in large part different means." 146 F. Supp. 905, 907.

In the *Rubinstein* case it was stated, in the sentence immediately preceding the quotation presented to the court by the petitioner (petitioner's brief, p. 59):

> "It would be a surprising theory of construction if the tolling of the statute applies to one who is not a party to the government litigation." 154 F. Supp. 216, 218

The case at bar is quite different from the above decisions, for 3M was named in the FTC proceeding and entered into the consent order by which the proceeding was terminated.

Even Butler, *Application & Constitutionality of Tolling of Statute of Limitations Provision of Section 5, Clayton Act, in Cases of Dual Enforcement Jurisdiction,* 8 American Bar Association, Antitrust Section Proceedings 42, 46 (1956), an authority regarded most favorably by petitioner observes:

> "There are several distinctions which may be important between the prima facie evidence provisions and the tolling provisions of Section 5. The government decree may be used in evidence only 'as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.' The tolling provision, on the other hand, applies to every right of action 'based in whole or in part on any matter complained of' in the government suit. In addition, the statute apparently is suspended from the time the government suit starts, whether or not the government prevails.' "

It is quite clear that there *are* benefits for a private litigant other than the introduction of the decree intended to be derived from a prior government proceeding. Part of the policy of the Clayton Act is the encouragement of private antitrust suits. This policy is clearly announced in Representative Clayton's original report on the bill:

> "This section also provides that the statute of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant during the pendency of a proceeding instituted by or on behalf of the United States. The entire provision [present sections 5(a) and 5(b)] is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the Antitrust Law." H. R. Rep. 627, 63rd Cong. 2nd Sess. 14 (1941).

In furtherance of this policy, the record produced by an FTC proceeding is obviously of great help in marshalling evidence for a private litigant's case. The record has been of significant assistance to plaintiff in this very matter.

Annexed to the FTC consent order filed against 3M is "Appendix A", which contains valuable factual information regarding 3M's transactions in the electrical insulation industry as late as 1958 (R. 35a to R. 40a).

That evidentiary material is available to private plaintiffs when adduced before the FTC is clear from the rules of the Commission itself:

> "Information in the following classes is public and may be obtained as indicated: . . .
>
> (e) The pleadings, transcript of testimony, exhibits and all documents received in evidence or made a part of the record in adjudicated proceedings (except evidence received in camera);" 16 C. F. R. Section 1.132(e); see generally 16 C. F. R. 1.131 *et seq.*

Finally, it must be pointed out that Professor Handler's statements quoted at page 64 of petitioner's brief are incomplete and out of context. The committee hearings at which he was testifying were held to consider a bill which contained a provision making *conclusive* a final judgment or decree rendered in any civil or criminal proceeding. H. R. 7905, 81st Congress, 2d Sess. The Professor appeared in support of the proposed legislation. The example put to him by Representative Michener concerned an "investigation" by the Justice Department, not a "proceeding", and it is in the context of the disclosure of the results of an investigation that it must be evaluated. Obviously the latter is not contemplated by 5(a), and certainly there can be no tolling under 5(b) as a result of an investigation. But in the same hearing, Handler strongly urged making the judgment or decree *conclusive* on the defendant because:

> ". . . I think that by making the evidence conclusive you would be adding to the pressure [on the defendant to

> enter into a consent decree]. I favor adding to the pressure because I think it is a potent instrument for deterring wrongdoing." p. 24.

Time and again the role of the private litigant is recognized as vital to our national policy of antitrust law enforcement.

Thus, as a matter of law and as a matter of policy, there is no reason to wed the provisions of section 5(b), which deal with tolling, to the *prima facie* evidence provisions of section 5 (a). The tolling section is patently broader in scope, and encompasses an FTC proceeding even though such a proceeding may not give use to *prima facie* evidence. Therefore, the FTC proceeding against 3M served to toll the statute of limitations, and plaintiff's complaint was timely filed.

B. The FTC proceeding against 3M was a "civil proceeding instituted by the United States" to enforce the antitrust laws within the meaning of section 5(b), and, for that matter, was also a "civil . . . proceeding brought by or on behalf of the United States" under section 5(a).

We turn now to 3M's statutory analysis, which concludes that an FTC proceeding *under the antitrust laws* is neither a "proceeding" nor instituted by "the United States" as those phrases are used in sections 5(a) and 5(b).*

1. An FTC proceeding under the Clayton Act is a "proceeding" within the meaning of sections 5(b) and 5(a).

3M argues that "an FTC proceeding is neither a '*criminal prosecution*' nor a '*suit or proceeding in equity*' " (peti-

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* Respondent discusses section 5(a) here without in any way abandoning its position taken in point I A, *supra*, because of the fact that the judicial and legislative discussion of the language in question relates only to section 5(a).

tioner's brief, page 15 *et seq.*). Neither phrase quoted or argued by the petitioner appears in section 5(a) or 5(b), of the Clayton Act. The language which 3M purports to analyze is contained in the original section 5 of the Clayton Act (38 Stat. 731), which was amended in 1955 to its present language. (69 Stat. 283).

However, even assuming that the "proceeding in equity" language of the original statute is relevant, there is no substance to the argument that an FTC proceeding under the antitrust laws is not analogous to such a proceeding.

a. The 1914 legislative history does not support petitioner's construction.

First of all we must, *per force,* agree with the analysis of *amicus* Highland Supply Corporation in its brief (page 13 *et seq.*) that resort to legislative history is unwarranted and misleading in this case. Any examination of volume 51 of the Congressional Record, which contains the debates on the Clayton and Federal Trade Commission Acts, will quickly involve the reader in a morass of antitrust legislation consisting of amendments to proposed bills in varying forms, some similar to the statute which eventually was enacted, others differing radically. Moreover, whatever legislative history there is, as 3M accurately stated at page 28 of its brief to the Third Circuit, "scarcely discussed" the tolling problem, and there is nothing to suggest that Congress ever actually considered the question whether an FTC proceeding is a "proceeding" within the tolling provision.

Any relevant debate clearly seems to relate to Congress' preoccupation with evidence problems; but even here no comfort can be found for the proposition that Congress did not intend FTC proceedings *under the antitrust laws* to be capable of giving birth to *prima facie* evidence under

the original section 5. This question simply never was discussed in 1914 because FTC determinations were not "final" within the meaning of the first paragraph of the then Section 5, and only "final" determinations gave rise to *prima facie* evidence.

Pending at the same time as the Clayton Act was the Federal Trade Commission Act (38 Stat. 717) whereby the FTC was established. *The Federal Trade Commission Act is not an "antitrust law" as that phrase is used in the statutes of the United States*, since it is not within the definition of "antitrust laws" found in section 1 of the Clayton Act, 38 Stat. 730, 15 U. S. C. section 12. Therefore, any legislative comments with respect to the powers of the Commission or the effect of the Commission's decisions rendered under the Federal Trade Commission Act are irrelevant to this case. FTC proceedings under the Federal Trade Commission Act can never be the basis for a private suit, since they are not brought to enforce an "antitrust law". It is erroneous to disregard this distinction, as petitioner does at page 23 of its brief, and quote the discussion between Messrs. Sutherland and Crawford. Their colloquy came in a debate over the provisions of the Federal Trade Commission Act and did not deal at all with the Clayton Act. Moreover, to further illustrate the lack of relevancy, this particular colloquy is in response to a proposed amendment to the Federal Trade Commission Act which reads as follows:

> "*Provided*, That no order or finding of the court or commission in the enforcement of this section shall be admissible as evidence in any suit, civil or criminal, brought under the antitrust acts."

This provision was not enacted into law.

To demonstrate that (as the *amicus* brief of Reynolds Metal Company amply illustrates)* the legislative history can be all things to all people, petitioner could reach equally as far as 3M in the very same debate and submit Senator Brandegee's comments which support the decision in this matter below:

> "What can be the object sought in preventing an innocent man from having the benefit of the opinion of this Commission, if it may render one, I do not see; neither if the judgment of this Commission or its opinion is worth anything, do I see, if suit is brought by the Attorney General under the Sherman Antitrust Law charging as a violation of that law the same act that was before the Commission charged with being an unfair method of competition, why the Government should not be allowed to introduce the order of the Commission directing the man to stop the practice or the injunction of the court at the request of the Commission, as provided in section 5. 51 Cong. Rec. 12792.

Despite the fact that Judge McLaughlin pointed out in his opinion in the Third Circuit that the debates reproduced at 51 Cong. Rec. 9488 *et seq.* relate to a version of the Clayton Act (H. R. 627, 63rd Cong., 2d Sess.) which did not even provide for FTC enforcement (R. 87; 232 F. 2d 346, 357) the discussion reported at those pages is repeated in part by petitioner's brief (p. 24 *et seq.*) in support of the thesis that only a Justice Department proceeding was contemplated by Congress in 1914. Obviously the speakers at that time could not have been contemplating an FTC

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* At p. 37 of Reynolds' brief is a quotation from Senator Walsh which supports the point that an FTC determination in an adjudicative proceeding comes with section 5(a) *today*, given the change in the nature of the Commission and its proceedings. See p. 34 *infra*.

proceeding when the bill never even provided for it. Such legislative history does nothing but obscure the issues.

In relying on the position of Senator Walsh at page 23 of its brief to demonstrate that only judicial proceedings were contemplated the petitioner points out that Senator Walsh desired to have findings in antitrust proceedings *conclusive* for the purposes of subsequent private litigation. There is significant difference between the considerations which must be weighed when a decree is to be conclusive and when it is to produce only *prima facie* evidence. The Senator's remarks do not apply to the situation at bar.

b. Since 1914, Congress has manifested an intent to endow the FTC with the characteristics of a court of equity.

By a series of legislative enactments, Congress has clearly broadened the powers of the FTC, given more vitality to the effect of its orders, and recognized both directly and indirectly that the FTC today is a body before which substantive rights may be finally determined within the dictates of due process. It is indeed a modern analogue to a court of equity.

Starting with the Wheeler-Lea amendments to the Federal Trade Commission Act in 1938, 52 Stat. 111, 15 U. S. C. sec. 45 which made FTC orders under the Federal Trade Commission Act final without an implementing decree from the Court of Appeals; and continuing with the Celler-Kefauver Antimerger Act, 64 Stat. 1125, 15 U. S. C. sec. 18; and the amendment which resulted in the enactment of sections 5(a) and 5(b) in 1955; through the Finality Act of 1959, 73 Stat. 243, 15 U. S. C. sec. 21(g) Congress has increasingly recognized the expanding scope and stature of the FTC. In *U. S.* v. *The Philadelphia Bank*, 374 U. S. 321, 346 (1963) Mr. Justice Brennan said:

"Congress in 1950 clearly intended to remove all questions concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction."

As the antitrust bar has noted:

"Dramatic prominence has been given to criminal proceedings brought by the antitrust division against a number of our largest corporations, but the activities of the Federal Trade Commission, as a general rule, will have the greatest potential impact upon small business. The jurisdiction of the Commission is exceedingly broad, reaching into virtually every corner of interstate activity. Awareness of the Commission's regulatory functions, more than ever, is essential in 1962, when the commission staff and appropriations—and hence its ability to act—will be the greatest in history." . . .

"As a general rule, the Justice Department has taken a hands-off policy with respect to violations of the Robinson-Patman Act, leaving the administration of that act largely to the Federal Trade Commission." Rockefeller and Wald, "Antitrust enforcement by the Federal Trade Commission and the Department of Justice: A Primer for Small Business", 66 *Dick. L. Rev.* 251, 252, 254 (1962).

As is pointed out in Note, "The Federal Trade Commission and Reform of the Administrative Process", 62 *Col. L. Rev.* 671 (1962) the political climate in Congress has changed from a position of mistrust in the early years to a growing feeling of respect for the functions of the Commission and the procedures adopted by it.

In 1965, if not in 1914, the FTC and similar administrative, quasi-judicial bodies are regarded by the courts as similar to courts of equity. *Cf. Pittsburgh Glass Co.* v. *NLRB,* 113 F. 2nd 698 (8th Cir.) *aff'd* 313 U. S. 146 (1940).

> "Many different types of administrative agencies are given power to issue 'cease and desist' orders, that is orders requiring a desistence from specific practices, and such authority need not necessarily be express. The analogy between such orders and an equitable injunction is recognized." 2 Am. Jur. 2d 279, *Administrative Law,* section 467 (1962).

In discussing the National Labor Relations Board's power to issue cease and desist orders this Court said, "We think that the Board has the same power to determine the needed scope of cease and desist orders from the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation." *May Dept. Stores* v. *NLRB,* 326 U. S. 376, 391-2 (1945). In *Jones* v. *S. E. C.,* 298 U. S. 1 (1935), it was held that an S.E.C. proceeding started by an order to show cause why a stop order should not be issued was "analogous to a suit in equity to obtain an injunction." *Cf. Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 443 (1943); *Pittsburgh Plate Glass Co.* v. *NLRB, supra.* There is no doubt that today an FTC proceeding to enforce the Clayton Act is a civil proceeding analogous to a proceeding in equity, especially when the result of that proceeding can be a final order which has *res judicata* effect as is discussed *infra* at page 42.

c. There is persuasive judicial precedent regarding an FTC proceeding as a "proceeding" under both sections 5(a) and 5(b).

Consistent with what we consider to be the absence of any persuasive legislative history there is positive judicial precedent for the position that an FTC proceeding falls within the purview of both sections 5(a) and 5(b), whether we deal with the present statutory language "civil proceeding" or the 1914 language, "proceeding in equity."

Even under the 1914 wording, Judge Frank of the United States Court of Appeals for the Second Circuit had no difficulty in equating an FTC proceeding with a proceeding in equity. In *Brunswick-Balke-Collender Co.* v. *American Bowling and Billiard Corp.*, 150 F. 2nd 69 (2nd Cir. 1945), he was faced with the problem of the admissibility of an FTC order issued pursuant to a proceeding instituted to enforce the Clayton Act. At the time of the decision, there was a disparity between Section 11 of the Clayton Act, 62 Stat. 991, 15 U. S. C. Sec. 21, the provision authorizing FTC enforcement proceedings, and section 5 of the Federal Trade Commission Act, 62 Stat. 991, 15 U. S. C. section 45, the Federal Trade Commission Act provision setting forth the Commission's authority. Under the latter the Commission's orders were final upon the expiration of a stated period after their issue, while under the former it was necessary to have the order implemented by an enforcing decree from the United States Court of Appeals before it achieved finality.

In the original *Brunswick* opinion, Judge Frank held that an FTC decree under the Clayton Act *was* admissible as *prima facie* evidence. He held that such an order was imbued with the same degree of finality as was an FTC order under the Federal Trade Commission Act by reason of 15 U. S. C. section 45. On re-hearing, the Court held that Sec-

tion 45 was not applicable to FTC proceedings under the Clayton Act, but was limited to the Commission's functions under the Federal Trade Commission Act. Therefore, the FTC order was held *not* to be a final judgment or decree within the purview of section 5(a), and consequently, it was inadmissible in the civil litigation.

In 1959, section 11 of the Clayton Act, 15 U. S. C. sec. 21(g) (73 Stat. 143) was amended to change the ultimate *Brunswick* result by providing automatic finality for an FTC order under the Clayton Act:

> "(g) Any order issued under subsection (b) of this section shall become final—
>
> "(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section; . . ."

The avowed purpose of this amendment was to impart to FTC decrees arising out of Clayton Act proceedings the same finality they enjoyed when issued in Federal Trade Commission Act matters:

> PURPOSE OF THE BILL
>
> ". . . The bill as amended would make final cease-and-desist orders issued by the Commissions and Boards with jurisdictions under Sec. 11 of the Clayton Act (. . . the Federal Trade Commission) in the same manner as cease-and-desist orders now become final when issued by the Federal Trade Commission pursuant to the procedures that are set forth in Sec. 5 of the

Federal Trade Commission Act." *U. S. Code Cong. & Admin. News*, 86th Cong., 1st Sess., p. 1804 (1959).[1]

Since Congress has amended the Clayton Act to conform with the Federal Trade Commission Act with respect to finality of FTC orders under Clayton, there no longer is any reason to doubt the propriety of Judge Frank's original decision before re-hearing. The fact that Congress, in 1950, 1955 and 1959, with full knowledge of the *Brunswick* opinion, expanded the jurisdiction of the FTC; eliminated the "equity" language and separated section 5(a) from section 5(b); and remedied the only defect in the Clayton Act which resulted in the reversal of *Brunswick* on re-hearing, is certainly proof of the acquiescense of Congress in the *Brunswick* rationale.

But for the original disparity in the two statutes involved, the *Brunswick* decision is a square holding that an FTC order is admissible as *prima facie* evidence against the defendant in a subsequent civil suit. The opinion cannot honestly be read any other way. If for purpose of the more demanding evidentiary aspects of section 5(a), FTC and Department of Justice proceedings are on a par, then each should be regarded as having been instituted by the United States within the less restricted purview of section 5(b). Any suggestion in the District Court opinion in *Proper* v. *John Bene & Sons, Inc.*, 295 Fed. 279 (E. D. N. Y. 1923) to the contrary must yield to the later and more authoritative *Brunswick* decision. Besides, on its facts, *Proper* is not persuasive or even helpful.

In *Proper*, after first holding that in any event the FTC order there being considered could not be admitted, even *prima facie*, against several defendants in a private ac-

[1] The legislative history further points out that the present language of 15 U. S. C. Sec. 21(g) is taken verbatim from 15 U. S. C. Sec. 45 with only unsubstantial chances. *Id.* at 1807.

tion, when only one had been before the FTC (which is a clearly correct holding, based on hornbook rules of estoppel), the court in *dictum* went on to discuss the then section 5 of the Clayton Act. 3M borrows some of the district court's gratuitous observations, made there in considering the then counterpart of section 5(a), in arguing the meaning of the present section 5(b). Even assuming, again for the sake of argument only, that this is a logical and proper approach to interpreting the tolling section, the argument must fall.

First, and foremost, *Proper* dealt with the effect of an FTC proceeding under the Federal Trade Commission Act.

Secondly, the *Proper* court relied on the fact that (at that time) an FTC order was not "final." This is no longer the law in light of *Brunswick*, *supra*, and the amendment to section 11(g) of the Clayton Act, discussed above. (Note that concern with finality relates only to the *prima facie* evidence provision; nowhere in section 5(b) does the word "final" appear.)

The *Proper* court did *not* hold that an FTC proceeding was not a "proceeding in equity," although in language spotlighted by petitioner here it entertained a "grave doubt" on the point. 295 Fed. 731. This Court must decide, on this issue, only whether an FTC proceeding is a "civil * * * proceeding" within the meaning of section 5(b), which it clearly is.

Finally, to distinguish the *Brunswick* holding petitioner relies on the case of *Wright* v. *Carter Products*, 244 F. 2nd 53 (2nd Cir. 1957) (see petitioner's brief page 33). That case was not a private suit under the antitrust laws but was a suit for personal injuries, so that obviously there would be no estoppel based on section 5(a). Furthermore,

Wright again deals with evidence, not with tolling. Finally it should be pointed out that the FTC's decree *was* admitted into evidence in *Wright* for the limited purpose of proving that there was notice to the defendant of the injury-causing propensity of the product involved. It was admitted for that purpose, even though this was not a private antitrust suit, because of common law rules of evidence. The court had no constitutional difficulty with admitting the FTC finding for this purpose.

For all of these reasons it is clear that an FTC proceeding is a "proceeding" within the meaning of section 5(b) as well as section 5(a).

2. *The FTC proceeding was "instituted by the United States."*

3M's statutory analysis continues with the proposition that "an FTC proceeding is not instituted 'by the United States'." (See petitioner's brief page 18 *et seq.*) This argument is not only startling in its articulation but entirely fallacious in its premises.

For example, to support its argument 3M cites section 2403 of Title 28, U. S. C., 62 Stat. 971 (Petitioner's brief, p. 19), which reads as follows:

> "§2403. Intervention by United States; constitutional question
>
> "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation

of evidence, if evidence is otherwise admissible in the case, and for argment on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality. June 25, 1948, c. 646, 62 Stat. 971."

Congress apparently is satisfied that when a federal agency is involved in litigation, no notice need be given to the Attorney General because the interests of the United States are adequately protected by the presence of the agency as a party. Is this proof that the agency is *not* the United States?

The statute of limitations of the Federal Tort Claims Act, 28 U. S. C. sec. 2401 (a), 62 Stat. 971, as amended, 63 Stat. 62, illustrates the fallacy in defining an amorphous phrase such as "United States" by reference to other unrelated statutes. For, in that legislation, the phrase "United States" is used to encompass not only the United States but its agencies, employees and other constituent parts. The section merely says "every civil action commenced against the United States . . ." This does not mean that the limitations provisions of the Federal Tort Claims Act are restricted to torts committed by the Justice Department! See *e.g. Reconstruction Finance Corporation* v. *Tuolumen Gold Dredging Corp.*, 137 F. Supp. 855 (D. Cal. 1953). There is obviously no value in looking outside the language of the Clayton Act to determine its meaning.

What is essential for accurate analysis here is a determination of *the function of the particular instrumentality of the Government in the circumstances involved.*

FTC v. *Nash-Finch Co.*, 288 F. 2nd 407 (D. C. Cir. 1961), cited by petitioner (Brief, p. 18) actually illustrates this point. There the FTC argued that the United States should have been joined as an indispensable party to a declaratory judgment proceeding, which had been brought to determine the finality of an FTC order outstanding at the date of the enactment of the Finality Act in 1959. The court said "the interest of the United States in such a case is represented by the agency whose ruling is challenged," page 410, and so no other arm of the Government was an indispensable party.

What is overlooked in each and every instance cited by the petitioner is the fact that there never has been a case in which the Justice Department was permitted to proceed with an antitrust litigation arising out of the same facts on which the FTC had already ruled—*when the FTC was acting pursuant to the antitrust laws.* Since the Federal Trade Commission Act is not an antitrust law, the holding in cases such as *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948); *U. S.* v. *Charles Pfizer & Co.*, 205 F. Supp. 94 (S. D. N. Y. 1962); *McKesson & Robbins, Inc.* v. *Charles Pfizer & Co.*, 235 F. Supp. 684 (S. D. N. Y. 1964) and *Matter of Columbia Broadcasting System, Inc.*, 235 F. Supp. 743 (E. D. Pa. 1964) are completely inapposite. In each of those cases the FTC was acting under the Federal Trade Commission Act. As such its jurisdiction was not identical with that of the Justice Department.

In three briefs in this matter, 3M has failed to cite one case in which the Justice Department was not bound by an FTC determination or in which the FTC was not bound by a Justice Department determination when both were proceeding on the same facts against the same parties *under the antitrust laws.* Actually, where two federal instrumentalities have concurrent and overlapping jurisdiction,

there is an estoppel between them. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 403 (1939); *Cromwell* v. *County of Sac*, 94 U. S. 351 (1877); *U. S. v. Willard Tablet Co.*, 141 F. 2nd 141 (7th Cir. 1944); *Hobby* v. *Hodges*, 215 F. 2nd 754 (10th Cir. 1954); *U. S.* v. *Five Cases, each containing one demijohn, 5 gallon size, of Capon Springs Water*, 156 F. 2nd 493 (2nd Cir. 1946); *U. S.* v. *One Dozen Bottles, each containing an article labeled in part Bouquet Tablets*, 146 F. 2nd 361 (4th Cir. 1944); *Lee* v. *FTC*, 113 F. 2nd 584 (8th Cir. 1940); *U. S.* v. *Hindman*, 179 F. Supp. 926 (D. N. J. 1960).

One clear effect of Judge Frank's opinion in *Brunswick* was to equate an FTC proceeding under the Clayton Act with a proceeding instituted by the Justice Department. *Cf. United States v. United Shoe Machinery Corporation*, 89 F. Supp. 349, 356 (D. Mass. 1950). This aspect of the *Brunswick* case is eminently correct. Otherwise, plaintiff's rights would turn on "the fortuitous circumstances of whether it is the Department of Justice or the Federal Trade Commission which institutes the proceedings." *Burns, A Study of the Antitrust Laws*, 529 (1958). The FTC and the Justice Department have concurrent and overlapping jurisdiction to enforce the Clayton Act. See Clayton Act, Sec. 11, 73 Stat. 243, 15 U. S. C. A. Sec. 21. Were there any rational method set forth by Congress or the agencies themselves to determine which shall prosecute a given violation, there might be some sense in attaching substantive legal significance to the character of the prosecutor. In fact, the selection of cases to prosecute is not coordinated or effected pursuant to any articulated criterion. *Burns, supra*, p. 528 *et seq.* In the *Atty' Gen. Nat'l. Comm. Antitrust Rep.* 374 *et seq.* (1955), it is stated that no boundaries have been set limiting the respective jurisdictions of the two enforcement agencies.

Assistant Attorney General Barnes testified in hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, 84th Congress 2nd Session, on June 7, 1955.

Chairman Kilgore asked:

"Do you not think it would be better if we spelled out the jurisdiction and responsibility and authority so that each [the Antitrust Division of the Justice Department and Federal Trade Commission] realized what his exclusive responsibility was and what his exclusive authority was?

"Mr. Barnes: Well I do not think I am qualified to answer the question.

"I have only seen it in operation where both have exclusive jurisdiction along certain lines. I think it has worked out quite well. It is always possible to overlook some field where action should be taken. But I also point out to you that when there is concurrent jurisdiction that it is a two-edged sword. It puts you on your toes.

"There is quite a little rivalry in certain areas between the Federal Trade Commission and the Antitrust Division to show that they are on the ball and watching developments, and under this system that we have, why, *the first one that takes the bit in his teeth is the one who has the priority* unless there is some reason to change that general rule because of the peculiar facts of the case . . ." (emphasis supplied)

"The Chairman: Your system [of allocation of prosecution between the Antitrust Division and the Federal Trade Commission], then depends upon personalities?

"Mr. Barnes: That is right.

"The Chairman: I think a law should not depend upon or be dependent upon personalities. I think a law must plainly say what it intends to say so that there is no question of personal agreement involved . . .

"Mr. Barnes: . . . but in responsibility it should be direct as to whether there should be two responsibilities rather than one, and that is a matter of congressional policy.

"The Chairman: That is right."

As noted by Judge Augelli (R. 64a) there is no justice in permitting a plaintiff's rights to be determined by such an *ad hoc* allocation of prosecutions to two agencies charged identically with enforcing the Clayton Act. Such a result might well render section 5(b) unconstitutional.

It is submitted that it would be a violation of the rights of private litigants as protected by the Fifth Amendment of the United States Constitution if the tolling provision was held inapplicable to them when happenstance placed an investigation and prosecution in the hands of the FTC rather than under control of the Antitrust Division of the Justice Department. *Butler, op. cit.*, page 46-52. There is no rational basis for the discrimination:

> "The nearest approach to a definite rule is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation." *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 427 (1935). See *Joseph F. Finch & Co.* v. *Kittrick*, 23 F. Supp. 244 (W. D. Mo. 1938) *aff'd* 305 U. S. 395.

Although the equal protection provision of the Fourteenth Amendment does not apply *in haec verba* to the Federal

Government, the concept of equal protection has been held to be an integral part of due process. *Cf. Bolling* v. *Sharpe*, 349 U. S. 294 (1954).

All of the weight of our constitutional history is directed against having the rights of citizens turn on "fortuitous circumstances" or "personalities". A holding affirming the opinions below will continue the thrust of that history.

3. *There is no constitutional barrier to holding that an FTC decree comes within Section 5(a).*

There remains for consideration the protestation that any construction bringing an FTC proceeding within the scope of section 5(a) violates the Fifth Amendment (Petitioner's brief, p. 48 *et seq.*). This motion is based on a Star Chamber view of an FTC hearing.

Respondent concedes that the rules of evidence before the Federal Trade Commission are broader than those before a court sitting with a jury. This does *not* mean that by regarding such proof the FTC thereby violates the constitutional rights of the parties who appear before it. Yet the decisions of the FTC certainly affect the substantive rights of those parties as finally as do judicial determinations. Similarly there are myriad fallacies in the notion that due process would in any way be violated were an FTC proceeding to generate *prima facie* evidence in a subsequent private suit.

Petitioner's theory totally disregards the epistemic foundations on which the rules for the admissibility of evidence are based. As Kenneth Culp Davis so precisely states:

"§14.01. The Trend of the Case Law

"The direction of movement on evidence problems throughout the legal system, in the judicial process as

well as in the administrative process, is toward (1) replacing rules with discretion, (2) admitting all evidence that seems to the presiding officer relevant and useful, and (3) relying upon 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs.'"

"Whether the trier of fact is a jury, a judge, or an administrator, the trend is away from the rigidity of the exclusionary rules, although the extent of the departures from the exclusionary rules is clearly much greater in cases tried before judges or administrators than in cases tried before juries, and is probably greater in cases tried before administrators than in cases tried before judges. Within each of the three categories, of course, the variations in practice are rather considerable, especially in judge-tried cases. In many cases before judges or administrators, the only direct effect of the exclusionary rules is the occasional application of a rule of privilege. The guides are not the complexities of the jury-trial rules but are the broad standards of relevance, materiality, and the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

"In cases tried before judges or administrators, the focus is less and less upon the somewhat artificial question of what evidence should be admitted or excluded and more and more upon the highly practical question of what weight should be given to particular evidence. (Footnote omitted). 2 Davis, *Administrative Law Treatise*, 250-251 (1958).

The courts have increasingly recognized that the legal process is a continuous search for truth and not a contest in technicalities, *ibid* §1401.

As Judge Wyzansky noted in *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 349, 356 (D. Mass. 1950):

> "It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the FTC is inadmissibile before a judge sitting without a jury in a civil antitrust suit brought by the government. There is no difference between the substance of antitrust law applied by the Commission and that applied by the court. In a *civil* antitrust case the Government has the unfettered choice of going before a Commission or before a court without a jury."

3M finds "substantive differences in the quality of judicial and administrative determinations of fact . . ." (Petitioner's Brief, page 48). This conclusion totally ignores the difference in expertise between agency and jury. Respondent submits that nothing produced by the petitioner with reference to the nature of the proof taken by the Federal Trade Commission in any way derogates from the trustworthiness of the evidence or the validity of the conclusions reached by the FTC.

A recent opinion by the New York Court of Appeals is in point. *Fleury v. Edwards*, 13 N. Y. 2d 334, 200 N. E. 550, 251 N. Y. S. 2d 647 (1946). In that case plaintiff's intestate had been involved in an automobile accident which resulted in his being injured. After testifying in a hearing by the State Motor Vehicle Bureau to determine whether any licenses should be revoked as a result of the accident, the intestate died. The procedure before the bureau had allowed the taking of testimony and cross-examination, the same opportunities which are afforded to a respondent in an FTC proceeding. See page 39 *infra*. Although the defendant in the subsequent negligence action argued that

the record of the testimony of the decedent should be inadmissible, the court held that it should be admitted because:

> "Everything seems to favor a holding that such former testimony of a now deceased witness should be taken when it was given under oath, referred to the same subject matter, and was heard in a tribunal where the other side was represented and allowed to cross-examine." Page 552, 553.

The court found no difficulty in admitting the testimony from the prior administrative proceeding because the party against whom the testimony was offered had the opportunity to cross-examine and had the same motive in the prior proceeding to expose falsehood and inadequacy of proof. Clearly this is the case where there has been a litigated proceeding before the Federal Trade Commission and it is only where the proceeding is litigated that the *prima facie* evidence provision applies.

As Chief Judge Desmond wrote:

> "The objective of all rules of evidence is to prevent further injustice by putting before the fact trier for testing, and acceptance or rejection such oral and documentary proofs as carry a high probability of trustworthiness . . . ."

In Judge Fuld's concurring opinion he said:

> "Whether prior testimony before an administrative body would have been admissible in 1879, when the predecessor of CPLR 4517 was adopted, is not significant. The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigations. Exceptions to the hearsay rules are being broadened

> and created when necessary. (Citations omitted) Absent some strong public policy or a clear act of preemption by the legislature, rules of evidence should be fashioned to further, not frustrate, the truth finding function of the courts in civil cases."

There are two primary reasons for exclusionary rules of evidence in a jury trial. The first stems from the nature of the jury. Comprised of a group of laymen, the jury is not competent to evaluate proof outside of the ken of the ordinary citizen:

> "A second thing to remember is that the jury-trial rules are intended for a constantly changing tribunal of fact composed of inexperienced jurymen dealing with hundreds of types of cases. When the tribunal is composed of *experienced professional men*, habitually inquiring day after day into the *same limited class of facts* (as happens with most administrative boards), an expert weighing of evidence can generally be counted on. The portions represented by the exclusionary jury rules can and will be applied by such a tribunal in weighing the evidence, without actual exclusion of it." 1 Wigmore, *Evidence*, 36 (3d ed. 1940).

There is no doubt that by reason of its expertise the Federal Trade Commission can accept and evaluate evidence not admissible at a jury trial without thereby arriving at a result which is not based on the truth. The basic trustworthiness of the FTC finding is as great as that returned by a jury of laymen.

But 3M argues that because *money damages* are involved in a private suit the defendant is entitled to all of the evidentiary safeguards of a jury trial (petitioner's brief, p. 51 *et seq.*). Accepting this hypothesis, the question thus becomes whether the admissibility of a FTC finding as *prima facie* evidence would violate those safeguards.

There can be no doubt from the foregoing that an FTC decree is trustworthy. The only other objection to its admissibility appears to be that it is hearsay. Wigmore accurately analyzes the basis for the hearsay rule as the right to cross-examine. 5 Wigmore, *Evidence*, 3 (3rd ed. 1940).

A respondent in an FTC proceeding has complete opportunity to present its case including full right of cross-examination, by reason of the rules of the FTC itself:

> "Every party, except intervenors, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing." 16 C.F.R. 3.15 (b)

In addition, parties appearing before the FTC have the right of depositions prior to hearing, 16 C.F.R. 3.11; the right to use requests for admissions as to facts and documents, 16 C.F.R. 3.12; and can, under appropriate circumstances, obtain subpoena power, 16 C.F.R. 3.17.

Finally, it should never be overlooked that the government determination is *not* conclusive. *The decree is only prima facie evidence.* Defendant still has complete right of rebuttal, even though by definition the right to litigate the issue fully has been afforded the defendant once before—at a time when the defendant also could have introduced evidence *in its behalf* which might not be competent in a jury trial.

The fact is that in permitting the FTC decree to be prima facie evidence there is no constitutional issue raised at all. This cannot be more graphically demonstrated than by the legislation which the FTC expressly requests in its Annual Report for 1964:

> "4. Amend section 5(a) of the Clayton Act (15 U. S. C. 16(a)) so as to include a final order of the Federal Trade Commission; that is, amend section 5(a) to read:

> A final judgment, decree or final order to cease and desist of the Federal Trade Commission heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A." p. 34.

It should not be assumed that the proposed legislation indicates that the FTC thinks that its decrees are not now *prima facie* evidence under section 5(a). Given the confusion in the law created by the divergent opinions in this case and *Highland Supply Corp.* v. *Reynolds Metal Co.*, 237 F. 2d 725 (8th Cir. 1964) there is no wonder that the Commission has asked Congress to give a definitive answer.

The proposal does indicate clearly, however, that the FTC has no constitutional difficulties with the notion that its decrees in *litigated proceedings* shall become *prima facie* evidence. Judge McLaughlin agreed:

> "It is also clear that the status of the *Brunswick-Balke* opinion of Judge Frank was fundamentally misunderstood.* The sound legal principles there pronounced

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* Judge McLaughlin is referring here to the decisions in *Highland Supply, supra; Volasco Products Co.* v. *Lloyd A. Fry Roofing Company*, 223 F. Supp. 712 (E.D. Tenn. 1963) and *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 223 F. Supp. 967 (D. Me. 1963).

that final FTC orders in Clayton Act proceedings are admissible within Section 5(a), was not reversed. It was simply not usable because, as was discovered, there was no Finality Act at the time, dealing with FTC-Clayton Act orders. When Congress passed the Finality Act in 1959, it simply vitalized the principle of *Brunswick-Balke* as to section 5(a). We are satisfied that this principle is good law and good common sense and that its logical extension is applicable to the Section 5(b) question here involved." 232 F. 2d at p. 360.

4. There is no policy barrier to holding an FTC proceeding within sections 5(a) and 5(b).

Marching alongside the constitutional bugbear envisioned by petitioner is a parade of horrors (called "anomalies") which the opinion below allegedly has created (see petitioner's brief, p. 67 *et seq.*).

The first such "anomaly" is that an FTC proceeding under the Federal Trade Commission Act cannot generate *prima facie* evidence,[1] while an FTC proceeding under the Clayton Act can, under the holding below. This is nothing more than the result of the conscious policy of Congress in defining "antitrust laws" under the Clayton Act to exclude the Federal Trade Commission Act. Congress did not give private plaintiffs the right to base a cause of action on a violation of the Federal Trade Commission Act, so that there is no reason to consider it anamolous that a decree issued in a proceeding under that statute cannot be evidence in a subsequent civil suit.

To point up the absence of any anomaly, a prosecution by the FTC for violation of the Federal Trade Commission

[1] Note that this discussion at page 68 of petitioner's brief talks about *prima facie* evidence and not tolling.

Act does not bar a subsequent prosecution by the Justice Department under the Sherman or Clayton Acts arising out of the same facts. *U. S.* v. *Charles Pfizer & Co., Inc., supra; McKesson & Robbins, Inc.* v. *Charles Pfizer & Co., Inc., supra; Matter of Columbia Broadcasting System, Inc., supra.*

Flowing from this first anomaly 3M predicts "a flood of litigation" (petitioner's brief p. 88). Where has it been? The statute of limitations is a four year statute. Clayton Act section 4b, as amended 69 Stat. 283, 15 U. S. C. 15b. The tolling provision tolls the statute of limitations for only one year after the pendency of the government proceeding. Section 5(b). Were petitioner correct, there would presently be pending in the federal courts "a flood of litigation" since Judge Augelli's opinion in the District Court in this matter was rendered on April 22, 1963. Any private litigant who was seeking to take advantage of an FTC proceeding terminated in the interim would have been required to institute his action within one year after such termination. Yet we have neither read nor been advised of any deluge of private antitrust suits since then.

Repeated at page 69 of petitioner's brief is the argument that there would be an estoppel against the Justice Department if paragraph 5(a) is held applicable to FTC proceedings under the antitrust laws. 3M is right. That *is* the law which petitioner hitherto has chosen to ignore. See page 30 *supra*.

At page 70 of its brief petitioner states:

> "If the statute of limitations is now to be tolled during the pendency of government 'investigations'—regardless of the outcome thereof—and if private plaintiffs are to be supplied with evidence from government investigations, private plaintiffs can be expected to await the results of government investigation, and the use-

fulness of private actions as an independent means of enforcement of the act will thus be diminished. Of course, it is also true that such a rule would forfeit a major present inducement to respondents in Commission proceedings to accept consent decrees."

This reasoning does not hold up under analysis. It was intended that private plaintiffs should await the results of government proceedings. See page 15, *supra*. The private action still will remain as a significant enforcement device under the antitrust laws because the threat of private action will deter violations.

With regard to the likelihood of consent decrees being inhibited (petitioner's brief, p. 70), it is well to point out that there are no *prima facie* evidence benefits to be gained by the private litigant when a consent decree is entered. Therefore, the impetus to consent will still be there, in order to avoid the evidentiary effect of the decree.

While it is true that the sanctions which a defendant faces when the Justice Department elects to proceed criminally under the Clayton Act are far more drastic than those which the Commission may impose under that Act (petitioner's brief, p. 70) this is not anomalous or even surprising. The Justice Department is equipped to maintain criminal prosecutions by its very structure and function in our executive system. The FTC is not. Happily, there is no overlapping of jurisdiction here; the function of each agency is clearly defined and no fortuitous circumstance affects the rights of individuals.

In this conjunction it is interesting to note that criminal prosecutions to enforce final FTC orders issued under either the Clayton Act or the Federal Trade Commission Act are brought by the Justice Department. Clayton Act, sec. 11, as amended, 15 U. S. C. section 21(l); Federal

Trade Commission Act, section 5, as amended, 15 U. S. C. 45(l). *Cf. U. S.* v. *St. Regis Paper Co.*, —— F. Supp. —— (S. D. N. Y. Feb. 9, 1965); C. C. H. Trade Reg. Rep. ¶71,379. The issue in such prosecutions is not whether the FTC determination was accurate. The Justice Department merely must show a violation of the decree. *Ibid.* Upon proof of such violation heavy monetary penalties may be levied against the respondent. What then remains of 3M's argument that the FTC proceeding is not sufficiently safeguarded in constitutional terms to render a judgment which may have a monetary effect? (see petitioner's brief, p. 51 *et seq.*). This, after all, is the heart of 3M's argument that an FTC proceeding should not result in *prima facie* evidence. Yet the decree is *conclusive* in a proceeding for cash penalties based on its violation.

The final anomaly seen by 3M stems from the fact that the FTC cannot sue for single damages under section 4a (petitioner's brief, p. 70). This is the result of the procedural requirements of a suit for single damages to which the Justice Department is uniquely adapted. But where Congress has decided that the Justice Department and the FTC are equally as well suited to handle a particular function—as is the case with the antitrust laws—no anomaly appears unless we permit a private litigant's rights to be determined by whether the FTC or the Justice Department undertakes a particular antitrust prosecution.

POINT II

Plaintiff's causes of action based upon violations of sections 1 and 2 of the Sherman Act were also suspended by virtue of the Federal Trade Commission proceeding against the defendant 3M.

Although the Federal Trade Commission proceeding against defendant 3M was based on the Commission's power to enforce the Clayton Act, the facts giving rise to the proceeding were substantially identical to those which give rise to plaintiff's Sherman Act cause of action. Namely, the FTC was concerned with potential violation of the antitrust laws caused by 3M's acquisition of I.W.I. in that "the effect of such acquisition (might have been) substantially to lessen competition, or *to tend to create a monopoly.*" (Emphasis supplied.) Clayton Act, Sec. 7, 38 Stat. 731, 15 U. S. C. Sec. 18.

The wording of the statute, Sec. 5(b) unambiguously supports the holding that plaintiff's causes of action under both the Sherman and Clayton Act were preserved. Thus, Sec. 5(b) speaks of a civil proceeding to enforce "*any* of the antitrust *laws,*" in which event the statute of limitations is tolled "in respect of *every* private right of action arising under said *laws* and based . . . on *any* matter complained of in said proceeding . . ." (Emphasis supplied). Plaintiff's Sherman Act complaints here are based on the identical factual matters complained of in the FTC proceeding.

In *Union Carbide and Carbon Corporation* v. *Nisley,* 300 F. 2d 561 (10th Cir. 1962), Chief Judge Murrah was faced with a similar issue. There the question was whether the Clayton Act statute of limitations (which applies to Sherman Act violations, too) was tolled by certain government

proceedings against the defendants. The government had alleged certain conspiratorial acts in violation of the Sherman Act. The defendants in *Nisley* tried to avoid tolling of the statute of limitations by applying the rules of estoppel. That is, they said that there could be no tolling unless the identical facts were raised in the government proceeding and in the subsequent private suit.

This proposition was categorically rejected by the Court:

> "If we accept the appellants' [defendants'] interpretation of Section 5(b), a Section 4 plaintiff would be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants. We do not think Congress intended any such result. Rather, we think Section 5(b), as amended, was intended to suspend the running of the statute on a Section 4 claim during the pendency of a government-instituted suit which complained of all, or a part of the means relied upon by the private plaintiff to effectuate the same general combination and conspiracy.
>
> "These private suits alleged substantially the same conspiracy against the same defendants as in the government suit. They relied upon the same documentary and oral proof to establish the conspiracy, and they also relied 'in part' on the same means for the effectuation of the same conspiracy. There was substantial identity of subject matter, and this was sufficient to suspend the running of the statute."

While *Nisley* is distinguishable from the case at bar, because the government proceeding and the private suit there both were based only on the Sherman Act, this distinction is not material. The intention of Congress in providing a tolling section was to permit private litigants to wait until the government proceeding terminates before filing suit. This Court has recognized that Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act are closely interrelated:

> "It must be assumed, however, that the public policy announced by Section 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints." *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, 507 (1947).

The two antitrust statutes are interlocking and overlapping parts of the same statutory scheme, and, as in the instant litigation, the same acts can be violative of both. There is no reason why a private litigant should be forced to institute suit under the Sherman Act *so long as the government proceeding*, even though under the Clayton Act, *deals with subject matter which violates both statutes. Nisley, supra*, p. 570. This "would add to the burdens of the private suitor to the harassments of the defendants." *Id.*

Plaintiff submits that to force a private litigant to institute suit under the Sherman Act just because the government decides to proceed only under the Clayton Act would be to frustrate the intention of Congress in enacting the tolling section, so long as the facts in the Clayton Act proceeding are substantially identical with and give rise in

substantial part to the private suitor's Sherman Act cause of action. This is the rationale of the *Nisley* opinion, which is equally apposite here.

Time and again courts have recognized that the label given to the antitrust laws is not important. What is significant is the fact that there are antitrust policies in the United States which must be supported and that the statutes supporting those policies inter-relate. To become over technical would frustrate this purpose. The Court of Appeals for the 8th Circuit dealt with the nature of the statute of limitations under the Clayton Act and its relationship to the entire antitrust law scheme in a recent opinion.

> "While lack of uniformity in the stautes of limitations was undeniably a prime factor which motivated Congress to enact § 4B, our careful consideration of all phases of the instant controversy drives us irresistibly to the conclusion that Congress was equally concerned with *efficient enforcement of the Clayton Act which certainly cannot be accomplished if the statute is given a literal construction.* We are not persuaded to believe that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized. (Emphasis supplied.) *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (8th Cir. 1962).

Citing cases such as *Momand* v. *Universal Film Exchange, supra,* and *Steiner* v. *20th Century Fox Film Corp., supra,* does not advance the argument of petitioner, since those cases involve parties other than those who appeared before the Government agency. Nor is it true that "matters complained of" are, as petitioner states "necessarily and essentially-different where the theory of antitrust liability differs" (petitioner's brief, p. 73).

Looking at the FTC complaint at page 25a *et seq.* it is clear that the allegations in paragraphs 1, 2, 3 and 4 are allegations which could sustain a Sherman Act cause of action as well as one brought under the Clayton Act. See *Utah Gas Pipelines Corp* v. *El Paso Natural Gas Co.,* 233 F. Supp. 955, 962 (1964). The language of the complaint is as follows:

> "1. Minnesota Mining, as the largest producer of electrical insulation tape, and with its acquisitions of leading manufacturers of other electrical insulation products, by acquiring two of the three largest distributors of electrical insulation products in the United States, *has extended and integrated its business in such manner as to substantially increase its position in the manufacture, sale and distribution of electrical insulation products;* and it may exercise the inherent powers of its acquired position to substanitially lessen competion or tend to create a monopoly in the manufacture, sale and distribution of electrical insulation products.
>
> "2. Manufacturers of electrical insulation products *have been foreclosed from a substantial share of the markets for said products.*
>
> "3. *Competition has been eliminated* between Prehler and IWI in the distribution and sale of electrical

insulation products in the sections of the country in which they are competing, and potential competition has been eliminated between said companies through the United States.

"4. Actual and potential *competition has been* eliminated between Minnesota Mining and the two acquired distributors. (Emphasis supplied)

Even a cursory examination of the problems involved indicates how a private plaintiff would be injured if the name of the antitrust law, rather than (as the statute commands) the fact that the defendant was involved in an antitrust proceeding "based in whole or in part on any matter complained of in" a subsequent civil suit, should determine whether the private litigant can await the outcome of the government proceeding. There is no justice to anyone in such a rule of law.

The "matters complained of" by the FTC in Docket 7973 are the same as those which form the basis for respondent's Sherman Act and Clayton Act causes of action. The Third Court so found:

"We, therefore hold that the acquisition of IWI was a 'matter complained of' within Section 5(b) and that the statute of limitations was tolled as to the Sherman as well as the Clayton counts."

CONCLUSION

Wherefore, respondent respectfully prays that the decision below be affirmed in all respects.

Respectfully submitted,

ALBERT G. BESSER,
Attorney for Respondent-Plaintiff.
744 Broad Street
Newark, New Jersey.

ALBERT G. BESSER,
RALPH M. LOWENBACH,
HANNOCH, WEISMAN, MYERS, STERN & BESSER,
Newark, New Jersey,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER

v.

NEW JERSEY WOOD FINISHING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of October 19, 1964, inviting the Solicitor General to express the views of the United States (R. 93–94).

JURISDICTION

The opinion of the court of appeals (R. 69–92) is reported at 332 F. 2d 346. The opinion of the district court (R. 58–67) is reported at 216 F. Supp. 507.

OPINIONS BELOW

The judgment of the court of appeals (R. 92) was entered on May 20, 1964. The petition for certiorari was filed on July 17, 1964, and granted on Octo-

ber 19, 1964 (R. 93; 379 U.S. 877). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the pendency of a Federal Trade Commission proceeding under the antitrust laws tolls the statute of limitations applicable to a private action based upon the same matter.

2. If the answer to the first question is "yes," a further question presented is whether respondent's treble-damage claims under the Sherman Act were "based in whole or in part on any matter complained of" in the prior Commission proceeding under the Clayton Act, so that the statute of limitations was tolled in this case.

STATUTE INVOLVED

The relevant statutory provisions are Section 4B and 5 of the Clayton Act. Sectioon 4B, 69 State. 283, 15 U.S.C. 15b provides, in relevant part, as follows:

> Any action to enforce any cause of action under sections 4 or 4A of this title shall be forever barred unless commenced within four years after the cause of action accrued. * * *

Section 5 of the Clayton Act, 69 Stat. 283, 15 U.S.C. § 16 in its present form (and as amended in 1955 to take account of the enactment of Section 4B) reads as follows:

> (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws

shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Section 5, as originally enacted (38 Stat. 731) and until 1955, read as follows:

That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws

to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken: * * *

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

STATEMENT

1. THE FACTS

On June 24, 1960, the Federal Trade Commission issued a complaint against petitioner charging a violation of Section 7 of the Clayton Act (R. 15a–25a). The complaint alleged the following facts:

Petitioner, a world-wide business enterprise, manufactured a number of varied products, including certain electrical insulation products. Between 1952 and 1956 it acquired fourteen companies, eight of which were in the electrical insulation field. Among the eight firms acquired were leading manufacturers of electrical insulation products and also two of the three largest distributors of such products (R. 17a–21a).

One of the two distributors was Insulation and Wires, Inc. ("IWI"), which petitioner acquired in August 1956 (R. 20a). By virtue of these acquisitions, petitioner became the largest distributor of electrical insulation products and also the largest manufacturer and seller of such products to original equipment manufacturers and to distributors (R. 22a–24a).

These acquisitions were alleged to have resulted in "the actual or potential lessening of competition and a tendency to create a monopoly" in the sale and distribution of electrical insulation products, because, *inter alia*, "[m]anufacturers of electrical insulation products have been foreclosed from a substantial share of the markets for said products" (R. 25a).

The Commission proceeding was terminated by a consent order dated August 24, 1961 (R. 47a) which, among other things, ordered divestiture of IWI (R. 44a–45a).

On November 20, 1961, respondent filed in the district court a complaint under the antitrust laws naming as defendants both petitioner and Essex Wire Corp., the company which had owned IWI prior to its acquisition by petitioner (5a–9a, 48a–55a).[1] The complaint sought treble damages and other relief. The complaint alleged that respondent was a manufacturer of electrical insulation products and had relied primarily on IWI, prior to petitioner's acquisition thereof, for the distribution throughout the

[1] The complaint was amended pursuant to order of the district court (R. 56a–57a). The changes made by the amendment are apparently not material to the issues here involved (See Pet. 6) and appropriate record references will therefore be made to the amended complaint (R. 48a–55a).

United States of respondent's products; that petitioner had entered into a combination and conspiracy to restrain, and had attempted to monopolize, trade in the manuufacture, sale and distribution of electrical insulation products; that one of the objects of the conspiracy was the elimination and suppression of competition in the distribution of such products; that the acquisition of IWI, the third largest distributor in the country, was one of the acts in furtherance of this conspiracy and attempt to monopolize; and that the result, among others, was to foreclose to respondent a substantial portion of the national market for electrical insulation products, in violation of Sections 1 and 2 of the Sherman Act. The complaint also alleged that petitioner's acquisition of IWI violated Section 7 of the Clayton Act and that respondent was damaged thereby.

2. THE DECISION OF THE DISTRICT COURT

Petitioner moved to dismiss the complaint or, alternatively, for summary judgment (R. 11a–13a), on the ground that respondent's action was barred by Section 4B of the Clayton Act, 15 U.S.C. 15b, because it had not been commenced within four years after the cause of action accrued. The district court denied the motion, holding that under Section 5(b), 15 U.S.C. 16(b), the limitations period had been tolled by the pendency of the Federal Trade Commission proceeding against petitioner (R. 66a–67a).

The court further held that the tolling provision of Section 5(b) applies, notwithstanding that the proceeding had terminated in a consent order before the

taking of testimony and that, therefore, under Section 5(a), that order could not have been used by respondent as *prima facie* evidence in the present action.

Finally, the court rejected petitioner's contention that the statute of limitations is not tolled as to respondent's claims based on the Sherman Act. It ruled that those claims are "based in whole or in part on any matter complained of in [the government] proceeding," as required by Section 5(b), since "[t]he factual issues, centering around [petitioner's] acquisition of IWI in August 1956 and the consequent effects of such acquisition on competition in the electrical insulation field, appear to be substantially identical in the proceedings" (R. 65a).

3. THE DECISION OF THE COURT OF APPEALS

On interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals upheld the denial of petitioner's motion (R. 92–93). Although its reasoning was similar to that of the district court, it went further in one respect. Petitioner argued below that the sole purpose of Section 5(b) was to afford the private suitor an opportunity to introduce as prima facie evidence (under Section 5(a)) the judgment or decree rendered in the prior government suit, and hence that a proceeding which cannot yield such a judgment or decree does not toll the statute of limitations under Section 5(b).[2] The district court had

[2] Petitioner appears to have receded from the position urged below (R. 61a–62a, 86–87), and also suggested in the petition for certiorari (Pet. 8–9), that a proceeding which *does not* (as distinguished from one which *cannot*) yield prima facie evi-

ruled that Section 5(b) had a broader purpose, *i.e.*, to enable the private suitor to gain the benefit of all information uncovered in the government proceeding. Accordingly it did not reach the question whether a Trade Commission cease-and-desist order would be admissible as prima facie evidence under Section 5(a). The court of appeals noted that the district court's position had substantial support (R. 89–90). It held, however, that a final cease-and-desist order in a Commission proceeding *is* admissible as prima facie evidence under Section 5(a) (R. 89),[3] and that such a proceeding plainly tolls the limitations period under Section 5(b).

SUMMARY OF ARGUMENT

I

While the words of Section 5(b) do not readily encompass the present case, the basic policy upon which Section 5(b) is predicated is no less applicable to Federal Trade Commission proceedings than to judicial proceedings instituted by the Department of Justice in the name of the United States. The purpose was to facilitate private suits for treble damages as sanctions for enforcing the antitrust laws by enabling the private suitor to wait and take advantage of the evidence produced by the government pro-

dence would not toll limitations and that therefore a government proceeding terminated by consent, as was the instant one, would not toll limitations.

[3] The court of appeals reached this question although the proceeding had terminated in a consent order and the order was therefore inadmissible as prima facie evidence in respondent's private action. It did so because it noted there was some evidence in the legislative history that the two subsections should be construed together and lower courts had so held (R. 89).

ceeding. While one of the advantages of waiting—the availability of the "judgment or decree" as *prima facie* evidence—may be confined to the adjudications of a court, other major advantages result from the evidence and leads to evidence developed by the government through expensive processes of discovery and investigation that a private suitor usually cannot afford. The latter advantages flow equally from court actions and Federal Trade Commission proceedings. In both cases the effect upon the defendant is the same; the delay cannot lull him into false security for he is timely charged with antitrust violations and actively engaged throughout the whole proceeding in preparing and presenting his defense. In both cases there would be duplication and waste motion in forcing private plaintiffs to go forward while the major proceeding brought by the government to determine whether there has been an antitrust violation is incomplete. It seems fair to say, therefore, that the basic purpose of tolling the statute of limitations in the case of judicial proceedings is equally applicable to proceedings before the Federal Trade Commission.

If Congress had plainly indicated a desire to distinguish between the two, its enactment would be conclusive no matter how irrational the differentation might seem. But the words are not that clear, especially when read in the light of the evolution of the Clayton Act. The provision from which Section 5(b) was derived provided for suspension in the case of any of the public enforcement proceedings authorized

by the original bill; for all were judicial. When criminal penalties were dropped and FTC proceedings authorized, no corresponding change was made in Section 5(b). Again, if a plausible reason rooted in policy could be suggested for the failure to add words more descriptive of Federal Trade Commission proceedings, we would acknowledge that a narrow, verbal interpretation might be required. None has been suggested. The fact appears to be that attention was focussed upon the very different problems of Section 5(a) and no one either noted or denied that the reason of Section 5(b) was equally applicable to the proposed new method of enforcement by the Federal Trade Commission.

Under these circumstances, we submit, the Court should apply Sections 4B and 5(b) in a way that gives effect to the basic legislative policy. Even in the absence of statutory guidance a period of limitations is not totally inflexible. Courts have traditionally looked to other settled policies to determine whether the statute should be tolled. *E.g. Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231. When statutory evidence of a basic policy arguably saving the plaintiff's rights is available, the authorities "indicate that the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances" (*Burnett* v. *New York Central R. Co.,* No. 437, this Term, decided April 5, 1965, slip opinion, p. 4).

In such a context, Section 5(b) should not be given a niggardly effect limited by verbal exegesis. "A statute may indicate or require as its justification a

change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. * * * The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before" (Mr. Justice Holmes on circuit in *Johnson* v. *United States,* 163 Fed. 30, 32, quoted with approval in *United States* v. *Hutcheson,* 312 U.S. 219, 235). So here, the major premise adopted by the Congress in enacting Section 5(b)—that plaintiffs in treble-damage actions should be free to await the benefit of timely government enforcement proceedings—is plainly indicated, and the courts should give effect to that policy of Congress, however inartistically it may seem in retrospect to have been expressed.

Under this analysis, problems concerning the interpretation of Section 5(a) become irrelevant. We may concede *arguendo* that the court below erred in concluding that a Federal Trade Commission order is a "final judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States." Not only are the critical words "judgment or decree" absent from Section 5(b), but the considerations bearing upon whether an administrative order should be given the same effect as a court adjudication in subsequent litigation are altogether different from those determining whether the running of the statute of limitations should be tolled. Moreover, since the focal issue is the effect to be

given the policy of Section 5(b) in applying Section 4B, the result should be the same, however the words in "any civil or criminal proceeding * * * brought by or on behalf of the United States" are construed.

II

The second issue in the case is whether respondent's cause of action arising under the Sherman Act was "based in whole or in part on any matter complained of" in the prior Clayton Act proceeding before the Commission. If not, then the statute of limitations was not tolled by this particular Commission proceeding even if, as we have argued, such proceedings stand on the same footing as judicial suits. We agree, however, with the court below that since the Sherman Act and Clayton Act claims were founded upon substantially the same underlying conduct, the "matter complained of" was the same for purposes of tolling the statute of limitations.

ARGUMENT

I

THE PENDENCY OF A FEDERAL TRADE COMMISSION PROCEEDING UNDER THE ANTITRUST LAWS TOLLS THE STATUTE OF LIMITATIONS APPLICABLE TO A PRIVATE ACTION BASED UPON THE SAME MATTER

Most of the argument in the present case, like the opinions below, is directed to the question whether the proceeding before the Federal Trade Commission is "any civil or criminal proceeding * * * instituted by the United States" within the meaning of Section 5 of the Clayton Act. In our view, this form of analysis puts the emphasis upon the wrong question. The ulti-

mate and only decisive issue here is whether the respondent's action is barred by the running of the four-year period of limitations set out in Section 4B of the Clayton Act. Since four years had elapsed after the cause of action arose, that question turns upon whether the running of the statute was tolled by the proceeding before the Federal Trade Commission. No citations are required to show that tolling may occur in the absence of an express and specific statutory exception. In this case the primary relevant evidence of congressional intent is to be found, of course, in Section 5(b), but under the authorities the critical inquiry is not limited by the literal reading of the words: it is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances" (*Burnett* v. *New York Central R. Co., supra,* decided April 5, 1965, slip opinion, p. 4).

The public interest, especially the interest in preserving a competitive economy with which the Department of Justice and Federal Trade Commission are charged, would be best served by holding that the running of the statute of limitations on private actions is suspended during the pendency of a Federal Trade Commission proceeding alleging violation of the antitrust laws and for one year thereafter, as both courts below held (R. 64a, 81). Private treble damage suits play an important role in antitrust enforcement, yet their effectiveness often depends upon evidence or leads to evidence developed by the superior resources of the government in judicial and administrative proceedings. From this standpoint there is scant difference between actions brought in court by the

Department of Justice and proceedings instituted before the Federal Trade Commission. Nor is it desirable to have the rights of potential private litigants turn on whether the Department of Justice or Federal Trade Commission takes the responsibility for attacking a particular violation of Section 7.

We recognize that there are serious obstacles to reaching the conclusion of the courts below, even though we are convinced that it best comports with the public interest. In our view, however, their answer carries out the policy of Sections 4B and 5(b) and can fairly be derived from the following elements.

A. THE BASIC POLICY OF SECTION 5(b) IS APPLICABLE TO FEDERAL TRADE COMMISSION PROCEEDINGS

Section 5(b) of the Clayton Act provides—

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; * * *.

It must be conceded, we think, that the words of Section 5(b) do not readily encompass the present case. No one would spontaneously describe an administrative proceeding upon a complaint issued by the Federal Trade Commission as a "civil or criminal proceeding * * * instituted by the United States" or—to use the original words of Section 5(b)—as a "suit or

proceeding in equity or criminal prosecution." The Department of Justice brings the suits and criminal prosecutions in the name of the United States, while the independent regulatory agencies sue and are sued in their own name. And the United States does not initiate the proceedings before an administrative agency. Nevertheless, even on a verbal level, there is room for debate. The practices just mentioned were unfamiliar in 1914 when Section 5(b) became law. The Federal Trade Commission is an agency of the United States. An administrative proceeding is a "civil proceeding" in the broad sense of the words, and it results in an order not significantly different from the injuction issued by the courts.

The basic policy upon which Section 5(b) is predicated is no less applicable to Federal Trade Commission proceedings than to judicial proceedings instituted by the Department of Justice in the name of the United States. The broad object of authorizing private suits for treble-damages in the original Sherman Act was "to use private self-interest as a means of enforcement" of the antitrust laws. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 751–752. In giving "to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee," Congress provided in the original Sherman Act "a strong and reliable motive for enforcement" (*ibid.*). By this means, Congress sought at the very outset to enlist the business community as "allies of the Government in enforcing the antitrust laws * * *" (51 Cong. Rec. 16319).

It soon became apparent, however, that preparing an antitrust case against a major corporate offender was a larger task than most injured persons could afford. Thus, in a message delivered to Congress on January 20, 1914 (51 Cong. Rec. 1964), President Wilson urged

> * * * giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit, and that the statute of limitations shall be suffered to run against such litigants only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience.

It was in response to that recommendation that Section 5 was enacted. "Congressional reports and debates on the proposal which ultimately became § 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich Motors* v. *General Motors*, 340 U.S. 558, 568). In the words of the committee reports, the "entire provision is in-

tended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H.R. No. 627, 63d Cong., 2d Sess. 14; S. Rep. No. 698, 63d Cong., 2d Sess. 45.

At the time of its enactment, the tolling provision was no doubt looked upon primarily as a handmaiden to the prima facie evidence clause, *i.e.*, as a means of assuring the private litigant an opportunity to reap the benefit of the decree rendered in the government suit. If that were its sole function, one might well question whether the tolling provision should be applicable to Commission proceedings. For, it seems unlikely that administrative cease-and-desist orders should qualify as prima facie evidence of treble-damage liability in a later court suit (see *infra*, pp. 34–35).

But implementation of the prima facie evidence provision is not the only means by which the tolling paragraph may ease the burdens of treble-damage litigation and thereby strengthen the role of the private suitor in the antitrust enforcement scheme. Tolling also enables the litigant "of small means" to use the prior government suit in other ways equally germane to the basic purpose of Section 5. In particular, suspension of the statute of limitations makes available to the treble-damage claimant the underlying facts and evidence brought to light by the government through its greater investigative resources and disclosed by the record of the prior suit. In this way, the private suitor is guided to the witnesses,

documents, and other evidence essential to his case. "[E]ven where prior government judgments are for no purposes admissible, former enforcement proceedings may lighten private plaintiffs' burden by settling difficult questions of law, spotlighting violations as well as valuable sources of information, and schooling subsequent litigants in tested pleading and trial techniques." Bicks, *The Department of Justice and Private Treble Damage Actions,* 4 Antitrust Bull. 5, 7 (1959). Another commentator, after noting that "[p]robably the most important single function of the plaintiff's lawyer in a private antitrust case is that of securing the evidence * * *," pointed to government cases as a source of evidence and declared that "even though orders of the F.T.C. and particular evidence or testimony in government cases may not be admissible as primary evidence in proof of plaintiff's case, all of such material is useful as furnishing both background data and leads to plaintiff's counsel and also as potentially impeaching material." Loevinger, *Handling a Plaintiff's Antitrust Damage Suit,* 4 Antitrust Bull. 29, 43, 44 (1959).

Nor are such advantages confined to situations in which the prior enforcement suit has failed to produce an admissible decree. Even where such a decree is available, command of the underlying evidence may enable the claimant to make a more persuasive showing than he could by resting on the prior judgment alone. It may also aid him in the difficult task of estimating and proving his damages. Although these effects were not in the forefront of Congressional attention in 1914, they are plainly encompassed by

the basic purpose of the tolling provision—*i.e.*, to give the private suitor the benefit of the government's fact-finding resources and thus strengthen his role in the enforcement scheme.

In short, in terms of the basic statutory objective of facilitating private suits for treble damages as sanctions for enforcing the antitrust laws by enabling the private suitor to wait and take advantage of the evidence the government's proceeding may produce, it makes no difference whether the prior government proceeding is brought by the Justice Department or the Federal Trade Commission.

From the standpoint of fairness to a defendant charged with antitrust violations the effect is also the same. Statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them" (*Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348–349). In Section 5(b), however, Congress expressed the clear judgment that the policy of repose was out-weighed by the policy of promoting compliance with the antitrust laws by facilitating private actions based upon developments in a prior government enforcement proceeding to prevent and remedy violations. There is scant danger of unfairness when the government's action is instituted

within the statutory period for bringing private actions, for in such a case the defendant is given timely notice that it is charged with antitrust violations, and it will be actively engaged throughout the whole proceeding in preparing and presenting its defense. It cannot make the slightest difference whether the government's proceeding is a civil or a criminal action in the courts or an administrative hearing before the Federal Trade Commission. The issues will be the same; the relevant facts and legal questions will usually be identical; and the likelihood of subsequent private actions is as great in one case as the other.

From the standpoint of the courts, the reasons that justify tolling the statute in the case of judicial proceedings are equally applicable when the government seeks an administrative remedy. The private claims will be neither more stale nor less. The evidence will be as available in one case as in the other. Indeed, there are obvious gains to judicial administration in permitting private plaintiffs to postpone their actions until the central question whether the defendants have violated the antitrust laws has been determined in a single, major proceeding prosecuted by the government.

Finally, to differentiate between the rights of plaintiffs when the Department of Justice institutes judicial proceedings and their rights when the Federal Trade Commission institutes administrative action would introduce troublesome and capricious distinction into the law. Both the Department of Justice and Federal Trade Commission have authority to institute proceedings for violations of the antitrust laws, the

one in court and the other by administrative proceedings. The Section 7 case against petitioner might equally well have been brought by the Department. The two agencies cooperate in allocating responsibility for particular violations to one or the other, so that defendants will not be put to the expense and risks of two proceedings. From the government's standpoint a rule that injured parties may delay bringing their actions when the government proceeds in court but not when it proceeds administratively would inject what ought to be an irrelevant element into the selection of the prosecuting agency. From the standpoint of the person injured it is capricious, if not unfair, to lose rights when the government chooses to proceed against the defendant through one agency which he would not have lost if it chose to proceed through the other.

In sum, we submit that the basic policy of tolling the statute of limitations in the case of judicial proceedings is equally applicable to proceedings before the Federal Trade Commission. There is no rational basis for different treatment of the two.

We recognize, of course, that if Congress had plainly indicated a desire to distinguish between the judicial and administrative proceedings with respect to the tolling of the statute of limitations, its enactment would be conclusive no matter how inadequate the basis for the differentiation might seem. But the words of Section 5(b) are not that clear, especially when read in the light of the evolution of the Clayton Act. Even if "civil or criminal proceeding * * * instituted by the United States" were thought not to

include a Federal Trade Commission proceeding as a matter of textual construction, the broadest conclusion which could fairly be drawn is that Congress mentioned the obvious and familiar instances but failed to advert to the novel administrative analogue.

The legislative history makes this clear. As originally passed by the House, the bill which became the Clayton Act (H.R. No. 15657, 63d Cong., 2d Sess.) did not provide for concurrent enforcement by the Federal Trade Commission. The substantive prohibitions of the bill[4] were to be enforced exclusively by judicial proceedings, *i.e.*, criminal prosecutions, civil injunction suits brought by United States Attorneys (Section 15, then numbered Section 13), and treble-damage suits by private litigants (Section 4, then numbered Section 5). Section 5 (then numbered Section 6) was part and parcel of that exclusively judicial enforcement scheme, providing—

> That whenever in any suit or proceeding in equity hereafter brought by or on behalf of the United States under any of the antitrust laws there shall have been rendered a final judgment or decree to the effect that a defendant has entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has monopolized, or attempted to monopolize or combined with any person or persons to monopolize, any

[4] The bill contained four substantive antitrust provisions designed to outlaw specified practices: price discrimination (Section 2); exclusive and tying contracts (Section 3, then numbered Section 4); intercorporate stockholding (Section 7, then numbered Section 8); and interlocking directorates (Section 8, then numbered Section 9).

> part of commerce, in violation of any of the antitrust laws, said judgment or decree shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the United States and such defendant, constitute against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law in favor of any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws.
>
> Whenever any suit or proceeding in equity is hereafter brought by or on behalf of the United States, under any of the antitrust laws, the statute of limitations in respect of each and every private right of action, arising under such antitrust laws, and based, in whole or in part, on any matter complained of in said suit or proceeding in equity, shall be suspended during the pendency of such suit or proceeding in equity. [S. Doc. 584, 63d Cong., 2d Sess., pp. 6–7, comparative print of H.R. 15657]

It is plain, of course, that at that stage the words of Section 5 were framed solely with reference to judicial proceedings and were intended to carry their natural meaning. Another, more important, conclusion is also warranted: the language was not chosen with a view to discriminating between judicial suits brought by the Justice Department and administrative proceedings before the Federal Trade Commission, since the latter had not yet been authorized; the statute of limitations was to be tolled by the only type of civil enforcement proceeding then contemplated.

The Senate Judiciary Committee proposed to eliminate the penal provisions from the House bill and to add a provision (now Section 11, 15 U.S.C. 21) giving the Federal Trade Commission (and, in appropriate cases, the Interstate Commerce Commission and Federal Reserve Board) concurrent enforcement power. After extended debate (51 Cong. Rec. 13848–49, 14088–100, 14200–228, 14250–76, 14312–23, 14460–61, 15818–21, 15827–29, 15854–67, 15934, 15946–57, 14986–87, 15996–16005, 16042, 16057–58, 16116–17, 16142–47, 16152–62, 16273–76, 16280–81, 16317–18),[5] those amendments were adopted.

Significant changes were also made in Section 5,[6] but the changes and virtually all of the legislative discussion were concerned with the first paragraph (now subsection (a)), and particularly with the question whether the judgment or decree rendered in the government's suit should be conclusive evidence

[5] Proponents of the change expressed the view that criminal penalties were too harsh (S. Rep. 698, *supra*, 43), that juries were disinclined to convict (14250, 16274), and that experience in attempting to enforce the Sherman Act by criminal process had shown this method to be ineffective (14274, 14312). Those who opposed the change were of the view that the sanctions which the Federal Trade Commission could impose were too mild to be as effective as criminal penalties (see, *e.g.*, 15819–21, 15867, 16280–81).

[6] The following significant changes should be noted: (1) Under the House version, a final judgment or decree was to be *conclusive* evidence in a treble-damage suit; the Senate version accorded such judgments or decrees only *prima facie* effect; (2) the House version would have applied only to a "suit or proceeding in equity"; the Senate version applied to "any criminal prosecution" as well; (3) the Senate added the proviso that "[t]his section shall not apply to consent judgments or decrees entered before any testimony has been taken. * * *"

against the defendant in subsequent private litigation (as the House bill provided) or merely *prima facie* evidence (as the Senate Committee proposed). The participants in the debate repeatedly referred to the first paragraph of Section 5 (now Section 5(a)) as though it applied only to judicial proceedings; it is fair to say that most of the debate was predicated upon that assumption. In contrast, the tolling provision was not a subject of controversy and received only passing reference.[7] There is no evidence that

[7] When the bill left the conference committee and went back to the House, the managers were called on to defend their handiwork against the charge that elimination of the criminal penalties had removed the bill's "teeth." Chairman Webb of the House Judiciary Committee attempted to describe the proposed enforcement procedures in the strongest possible light. After reading Sections 5 and 11 (the provision vesting enforcement responsibility in the Trade Commission), he stated (51 Cong. Rec. 16274):

> Now, the value of these two sections is this: That they not only give the individual the right to sue for treble damages where he pleases, and we not only suspend the statute of limitations against an individual if a *Government* suit is brought against a trust, but we also require the *Federal Trade Commission* to stop these practices and take those guilty of such practices into court.
>
> But that is not all. Some argue that after the Trade Commission takes jurisdiction that excludes individuals from pursuing these other remedies. The bill further provides:
>
> No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts.
>
> So you have three or four distinct remedies, all of which may be invoked at the same time. [Emphasis added.]

It would appear, therefore, that Chairman Webb differentiated between suits by the "Government"—the suits to which the

any member of the Congress addressed himself specifically to the question whether the proposed proceedings before the Federal Trade Commission were or were not encompassed by the tolling provision. No one suggested that the language was broad enough to cover them, but, on the other hand, neither did anyone suggest that the previous intent to toll the running of limitations in the case of all civil enforcement proceedings ought not to encompass the Federal Trade Commission. The most that can be said, as we read the history, is that there was a loose tendency to assume that the second paragraph of Section 5 (now Section 5(b)) rode along with the first paragraph, probably because of the mistaken assumption that the chief reason for waiting would be to use the judgment or decree as evidence, and no one noted that the policies underlying the *prima facie* evidence and tolling provisions became quite separable as soon as the provisions for Federal Trade Commission pro-

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tolling provision applied—and proceedings of the Federal Trade Commission. That he equated the former with actions brought under the direction of the Attorney General was confirmed only moments later by the following exchange (51 Cong. Rec. 15276):

> Mr. HARDY. Under the bill does the Government have the authority to bring suit for injunction as well as private parties?
>
> Mr. WEBB. Yes. Section 15 gives the district attorneys under the direction of the Attorney General the right to apply for an injunction.

While these statements, taken together, seem to presuppose that the tolling provision applies only to suits brought by the Attorney General, it is apparent that Chairman Webb's attention was not focused upon the present issue. Under such circumstances his passing words, while his mind was directed to another point, cannot be given controlling weight.

ceedings were introduced. For while a strong argument can be made that an order resulting from what were then conceived to be novel and highly flexible administrative proceedings ought not to be *prima facie* evidence in an action at law, there was, as we have seen, scant basis for differentiating administrative and judicial proceedings with respect to other benefits derived by potential plaintiffs from the tolling provision.

The short of the matter follows:

(1) The basic policy upon which Section 5(b) is predicated is no less applicable to Federal Trade Commission proceedings than to judicial proceedings instituted by the Department of Justice in the name of the United States. The purpose was to facilitate private suits for treble damages as sanctions for enforcing the antitrust laws by enabling the private suitor to reap the advantage of the evidence brought to light by the government suit. While the availability of the "judgment or decree" as *prima facie* evidence may have been conceived to be the principal advantage and to have been confined to judicial determinations, there are in fact other practical benefits flowing equally from court actions and Federal Trade Commission proceedings.

(2) The words "any civil or criminal proceeding * * * instituted by the United States" (Section 5(b)) resulted from the original form of the Clayton bill and their juxtaposition in relation to Section 5(a) rather than from a deliberate decision to toll the statute only in the case of judicial proceedings.

B. THE BASIC POLICY OF SECTION 5(b) SHOULD CONTROL THE APPLICATION OF SECTION 4B

We submit that under the circumstances set forth above, the courts should apply Sections 4B and 5(b) in a way that gives effect to the basic legislative policy. The critical issue is not the textual construction of Section 5(b), but whether respondent's action is barred by the four-year period of limitations provided by Section 4B. The latter's effect cannot be determined merely by reading the words. Even in the absence of statutory guidance courts have traditionally looked to other settled policies to determine whether the running of a statute of limitations should be tolled. Thus, the plaintiff is excused where his delay results from the misconduct of the defendant, *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231; where war deprives him of a tribunal, *Hanger* v. *Abbott,* 6 Wall. 532; and where he brings suit but in the wrong venue, *Burnett* v. *New York Central R. Co.,* No. 437, this Term, decided April 5, 1965. "These authorities indicate that the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Ibid.*, slip opinion, p. 4.

In such a context, Section 5(b) should not be given a niggardly effect confined by verbal exegesis. The question is whether congressional purpose is served by tolling the statute of limitations. That purpose must be given judicial effect if it is fairly discernible behind the specific manifestation. The rule applicable to such cases was stated, albeit in a somewhat

different context, by Mr. Justice Holmes sitting on circuit in *Johnson* v. *United States,* 163 Fed. 30, 32 (C.A. 1):

> A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

The principle finds many illustrations. It is familiar law that violation of a criminal or penal statute containing no express reference to civil liability will lay the foundation for liability based upon the mere violation of the statute or a ruling that the violation is negligence *per se. Texas & Pacific Railway Co.* v. *Rigsby,* 241 U.S. 33; Harper and James, *The Law of Torts,* § 17.6; Prosser, *Torts* (1964 ed.), 191–93. In such cases, as Professor Prosser points out (p. 193), the courts are shaping the judge-made law "to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind." Similarly, criminal statutes treating intercourse with an adolescent girl as rape have been given the effect of negating the defense of consent in a civil

action for battery because the premise underlying the criminal law—adolescent incapacity to form an intelligent judgment—is equally applicable in the action to impose civil liability. *Gaither* v. *Meacham,* 214 Ala. 343, 108 So. 2d; *Bishop* v. *Liston,* 112 Neb. 559, 199 Northwestern 825; 1 Restatement of Torts § 61; Harper and James, *The Law of Torts* § 3.11. See also the discussions of the underlying principle in Landis, *Statutes and the Sources of Law,* Harvard Legal Essays (1934) 214; Pound, *Common Law and Legislation,* 21 Harv. L. Rev. 383 (1908); Stone, *The Common Law in the United States,* 50 Harv. L. Rev. 4, 13 (1936). See also *Gooch* v. *Oregon Short Line R.R. Co.,* 258 U.S. 22, 24; *Van Beeck* v. *Sabine Towing Co.,* 300 U.S. 342, 351 (Cardozo, J.); *Kiefer & Kiefer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 391.

The principle was applied to interrelated statutes in *United States* v. *Hutcheson,* 312 U.S. 219, where the Court, relying upon the precept quoted above from Mr. Justice Holmes' opinion in *United States* v. *Johnson,* held that the definition of labor dispute in the Norris-La Guardia Act, which by its terms was only a definition for the purpose of restricting the power of the courts to issue injunctions, exemplified a broader, underlying policy immunizing labor unions against liability in a criminal prosecution or action for damages, and the broader policy was therefore read into Section 20 of the Clayton Act.

In the present case, the major premise adopted by Congress in enacting Section 5(b)—that plaintiffs in treble damage actions should be free to await the bene-

fit of timely government enforcement proceedings—is as applicable to administrative proceedings instituted by the Federal Trade Commission as it is to lawsuits initiated by the Attorney General in the name of the United States. Where the basic policy is so plain, it would be a misfortune if a narrow or grudging process of construction were to confine the effect of the statute to the particular cases to which Congress adverted and so to discriminate against injured persons whose equity is indistinguishable. "There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system." *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 351. As pointed out above, this Court recently held in *Burnett v. New York Central R. Co., supra,* decided April 5, 1965, that in applying a statute of limitations "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances" and that "[i]n order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." In the present case, such an examination of the "purposes and policies underlying" the tolling provision and the Clayton Act's enforcement scheme yield the conclusion that the tolling provision should apply to Trade Commission proceedings no less than to Justice Department suits.

C. SECTION 5(a) IS IRRELEVANT

For the purposes of the present case we may assume that the court below erred in concluding that a Federal Trade Commission order is a "final judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States." The court's construction seems exceedingly difficult as a matter of terminology, for whatever may be the meaning of "any civil or criminal proceeding," both ordinary legal usage and the Clayton Act itself draw a sharp distinction between a "final judgment or decree" rendered by a court and an administrative "order." The legislative history apparently supports the petitioner's interpretation of Section 5(a).[8]

[8] Three items seem particularly significant.

(i) The principal subject of controversy in connection with Section 5 was whether the judgment or decree rendered in the government suit should be *conclusive* evidence against the defendant in subseqent private litigation (as the House bill provided) or merely *prima facie* evidence (as the Senate Committee proposed). Senator Walsh, who led the unsuccessful fight for the House version, defended its constitutionality on the ground that the defendant "has had an opportunity to try out before a court, with all the forms of law, every question involved in the *lawsuit*. * * * Here the party has had its day in *court*. He has tried every issue and it is simply a question, now that he has it tried, whether he may insist upon a *second trial*." (51 Cong. Rec. 13851, 13857, emphasis added.) Even more significant was the fact that opponents of the "conclusive evidence" proposal never challenged the premise, implicit in the remarks of Senator Walsh and others, that only decrees rendered in *judicial* proceedings were contemplated by Section 5. Not once did they suggest that under the House version, administrative findings based upon judicially-incompetent evidence would be conclusive of the defendant's liability in a treble-damage action. A constitutional objection based on that ground

There are grave difficulties (i) with the court's ruling that a Federal Trade Commission order became a final judgment or decree when carried to the court of appeals prior to the enactment of the Finality Act. 73 Stat. 243, but not otherwise—a wholly aritficial result—and (ii) with ascribing to the

would have been more substantial than any of those actually raised and undoubtedly would have been made had any member of Congress believed the argument possible.

(ii) We have already noted the remarks of Chairman Webb in defending the bill, newly emerged from conference, against the charge of "toothlessness" (*supra*, p. 25, fn. 7). The next day Representative Floyd, another of the House managers, again attempted to persuade his colleagues of the strength of the enforcement scheme contemplated by the bill (51 Cong. Rec. 10519, emphasis added):

> That is not all. Under Section 5 of the bill any private litigant injured by the unlawful acts of any corporation, whether the *Government of the United States* has proceeded against such corporation and obtained a judgment either in *a court of law or equity* is allowed use of that judgment or decree to show the unlawful acts of ~~that judgment or decree to show the unlawful acts of~~ the combination to the full extent that it would be an estoppel between the Government and the original offender. * * * That is a new remedy and a most efficient remedy. The Government of the United States, acting in behalf of all of its citizens prosecutes a trust, convicts it either in *a criminal or a civil court* and the private litigant, injured by the unlawful acts of such trust, has nothing to do in order to recover the three-fold damages except to prove the amount of damages and that the injury was done by this trust or corporation. * * *
>
> But that is not all. There are several other remedies provided in this bill. Under Section 11, the violation of Sections 2, 3, 7, and 8 may be enforced, respectively, by the Trade Commission, by the Interstate Commerce Commission, or by the Federal Reserve Board.

If Representative Floyd had believed it possible that these administrative rulings might inure to the benefit of treble-

Finality Act an intention to convert a Commission order into a "judgment or decree" for the purposes of Section 5(a)—a consequence never suggested during consideration of the Finality Act. Most important, Congress might well have concluded as a matter of substantive policy that it was unwise to give such *prima facie* effect to an order made without regard to the rules of evidence in the comparatively free and untried administrative proceedings of the proposed new Federal Trade Commission. In this con-

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damage plaintiffs, he would surely have mentioned, indeed proclaimed, that fact.

(iii) During the debates on the Federal Trade Commission Act, which was pending concurrently with the Clayton bill, Senator Cummins proposed an amendment to the effect that "no order or finding of the court or commission in the enforcement of this section shall be admissible as evidence in any suit, civil or criminal, brought under the antitrust acts." (51 Cong. Rec. 12788.) With respect to that amendment, the following interchange ensued (51 Cong. Rec. 12789–12790):

> Mr. CRAWFORD. I refer more particularly to the findings of the court.
>
> Mr. SUTHERLAND. I am taking up the propositions of the Senator seriatim. I am first dealing with the question of the commission. So far as the findings of the commission are concerned, I do not think they ought to be evidence anywhere.
>
> Mr. CRAWFORD. I do not, either.
>
> Mr. SUTHERLAND. I doubt very much whether we could make them evidence. I hope to discuss that question in another connection later along, before we get through with this bill. So far as the decision of the court is concerned, however, I see no reason in the world why that decision should not be admissible as an estoppel in another proceeding involving the same facts though called by a different name.

text there are important differences between judicial and administrative proceedings.

Whether the meaning of Section 5(a) be clear or ambiguous with respect to Federal Trade Commission proceedings, it should not determine the question whether such a proceeding tolls the running of the statute of limitations, because of the interplay between the policy of Section 5(b) and Section 4B. The words "final judgment or decree," which are the most persuasive textual arguments for excluding Federal Trade Commission proceedings from Section 5(a), are not repeated in Section 5(b). Furthermore, while we think that a Federal Trade Commission proceeding could be held to be a "civil or criminal proceeding * * * instituted by the United States," the real thrust of our argument is that the exact meaning of the phrase need not be decided because the underlying statutory policy is applicable to Federal Trade Commission proceedings whether the language covers them or not; and that policy, we submit, is controlling in determining whether the running of the statute of limitations has been tolled. See p. 28, *supra*. From this point of view, Section 5(b) is readily severable from Section 5(a), since the considerations determining whether an administrative order should be given the same effect as *prima facie* evidence as a court adjudication in subsequent private litigation are altogether different from those involved in determining whether the running of the statute of limitations should be tolled.

II

RESPONDENT'S SHERMAN ACT CLAIMS WERE BASED "IN PART" ON "MATTER[S] COMPLAINED OF" IN THE COMMISSION PROCEEDING

Under Section 5(b), the statute of limitations is tolled only as to those private rights of action which are "'based in whole or in part on any matter complained of" in the prior government proceeding. The second issue in the case is whether respondent's claims under Sections 1 and 2 of the Sherman Act were based "in part" on the same "matter complained of" in the earlier Trade Commission proceeding. The question need be reached, of course, only if the Court concludes that Commission proceedings, like judicial suits brought by the Justice Department, toll the limitations period. We note, however, that the second issue—the equivalence of subject matter between the earlier and later proceedings—is logically independent of the first; it would arise in precisely the same form even if the prior enforcement proceeding had been a court suit by the Justice Department, rather than a Trade Commission proceeding.

Respondent's Sherman Act claims rest on allegations that petitioner combined and conspired to restrain, and attempted to monopolize, trade in the manufacture, sale and distribution of electrical insulation products, for the purpose, among others, of suppressing and eliminating competition in the distribution of such products; that one of the acts by which petitioner carried out the conspiracy and attempt to monopolize was the acquisition of the IWI, the third largest distributor of such products and the

distributor on which respondent primarily relied for the distribution of the products it manufactured; and that the effect on the respondent was to disrupt its pattern of manufacture, sale and distribution and to foreclose to it a substantial portion of the national market for electrical insulation products (R. 49a–54a).

The allegations plainly are based, "in part" at least, on matters "complained of" in the Commission proceeding. The Commission complaint charged that the IWI acquisition, together with that of another distributor, put into the hands of petitioner, itself a manufacturer of electrical insulation products, two of the three largest distributors of such products; that following these acquisitions the distribution for a number of manufacturers who had reached the market through those distributors was discontinued (R. 24a); and that the effect of petitioner's acquisition of those particular distributors included "the actual or potential lessening of competition" in the manufacture, sale and distribution of electrical insulation products and the foreclosure of manufacturers "from a substantial share of the markets for said products" (R. 25a). In short, both the Commission and the respondent allege that the effect of petitioner's acquisitions of distributors of electrical insulation products has been to injure competing manufacturers of those products by denying them the access to the market that they formerly had through the acquired distributors. All that the statute requires for tolling is that there be a "substantial similarity" (*Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, 219 (C.A. 9)) or a "substantial

identity of subject matter" (*Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561, 570 (C.A. 10)) between the private and the government suit. The standard plainly is satisfied here.

Petitioner argues (Brief 71) that respondent's Sherman Act claims, unlike its Clayton Act claim, are different from the matters complained of in the Commission proceeding in that a Sherman Act violation is predicated upon an actual restraint of trade or monopolization, whereas a Clayton Act violation requires only a potential anticompetitive effect. It maintains that the Commission "apparently considered that no actual restraint of trade or monopoly had resulted from [petitioner's] acquisition" (Brief 74), whereas respondent has charged that petitioner "fomented an actual restraint of trade and monopolized commerce * * *." *Ibid.*

We note first, that the Commission alleged that the effects of petitioner's acquisitions included an "actual" as well as a "potential" lessening of competition and that manufacturers "have been foreclosed from a substantial share of the markets" (R. 25a). Thus the Commission's complaint did charge an actual restraint. Secondly, respondent alleged that petitioner's conduct constituted an attempt to monopolize (R. 54a). Such an illegal attempt may be established even though no restraint prohibited by Section 1 is achieved. *United States* v. *Columbia Steel Company*, 334 U.S. 495, 525, 531–532. Thus, with respect to respondent's claim resting on Section 2 of the Sherman Act, respondent need not establish an actual restraint of trade.

There is, however, a more fundamental objection to petitioner's argument. Under its theory, the private antitrust litigant is not entitled to await the outcome of the government proceeding, notwithstanding that the private antitrust claim may allege conduct identical, word-for-word, with that alleged in the government complaint. The tolling provision is said to be inapplicable if the only difference between the government and the private complaint is that the former alleges that the conduct *may* substantially lessen competition (Clayton Act, § 7) and the latter alleges that it *has* done so (Sherman Act, § 1). The statute, however, provides for tolling as long as the private antitrust claim is based merely "in part on any matter complained of" in the government proceeding, and the fact that the private suit alleges that the same conduct has greater anticompetitive effect than was alleged in the government suit does not make the conduct challenged in the private suit any the less a "matter complained of" by the government. Moreover, petitioner's argument disregards this Court's reluctance to "add requirements to burden the private litigant beyond what is specifically set forth by Congress * * *." *Radovich* v. *National Football League*, 352 U.S. 445, 454.

CONCLUSION

The decision below gives effect to the policies underlying Section 5(b) of the Clayton Act and promotes the interest in the maintenance of a competitive economy by facilitating private suits as sanctions for violations of the antitrust laws. While the result is difficult and perhaps impossible to justify in terms of

conventional analysis of the text and legislative history, it is supportable as a proper judicial application of the legislative will in an area in which the courts have traditionally looked, not to the words of the limitation alone, but to other established legal policies in determining whether the running of the statute should be tolled.

Accordingly, the judgment should be affirmed.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant to the Attorney General.
FRANK GOODMAN,
Assistant to the Solicitor General.
ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY,

Petitioner-Defendant,

v.

NEW JERSEY WOOD FINISHING COMPANY,

Respondent-Plaintiff.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

SIDNEY P. HOWELL, JR.,
230 Park Avenue,
New York 17, New York,

CHARLES C. TRELEASE,
744 Broad Street,
Newark 2, New Jersey,
Attorneys for Petitioner-Defendant.

PAUL J. QUINN,
EDWIN E. MCAMIS,
REGAN GOLDFARB POWELL & QUINN,
New York, New York,

THOMAS J. LYONS,
St. Paul, Minnesota,
Of Counsel.

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MINNESOTA MINING AND MANUFACTURING COMPANY,
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v.

NEW JERSEY WOOD FINISHING COMPANY,
Respondent-Plaintiff.

PETITIONER'S REPLY BRIEF

Introductory Comment

Just as the Third Circuit, while affirming, differed in rationale and, indeed, in result from the District Court, so now the Solicitor General, while urging the same result, disagrees with respondent's attempt to reconcile the divergent views of both courts below. We submit that, despite the uniformity in result achieved so far or desired for the future, this overall discord speaks eloquently to the point that it is fundamentally unwise, if not simply improper, to leave the relatively clear course charted years ago by Congress and navigated smoothly ever since by all involved in antitrust enforcement.

The principal quarrel among the courts below, our adversary and now the Solicitor General (whose brief was filed at the Court's invitation in the order granting

certiorari) turns upon (i) just how to rationalize an extension of Section 5(b) to encompass tolling during pendency of an FTC proceeding and (ii) whether Section 5(a) is or is not thereby affected. In this process virtually every other relevant policy consideration has been ignored as have "conventional" tools of statutory construction.

Roughly speaking, the District Court and the Solicitor General have adopted a policy approach to their respective interpretations of Section 5 as a whole. The District Court finds tolling for FTC proceedings justified on the ground that it would be "illogical" to hold otherwise and without reference to any impact on Section 5(a). The Solicitor General ascertains a paramount Congressional purpose which, though never articulated, should, as a matter of policy, now bring FTC proceedings within Section 5(b). He, however, affirmatively rejects—again as a matter of policy—any notion that FTC determinations are comprehended within the almost identical language of Section 5(a).

On the other hand, the Third Circuit and our adversary have chosen a highly legalistic approach which has led the Third Circuit to read FTC proceedings into Section 5 for *all* purposes although respondent apparently still shies from arguing that inclusion of FTC proceedings in Section 5(b) necessarily means qualifying FTC determinations as prima facie evidence under Section 5(a).

Our main brief dealt primarily with the variant decisions of the courts below and so much of respondent's present argument as was accepted at those levels. We therefore now deal primarily with the markedly different "views of the Government."

With Respect to the Government's Views . . .

The pervasive difficulty with the Government's position stems from, first, its unwillingness to accept Congress' choice of the adjective "civil" as defining the proceedings "by (or on behalf of) the United States" in both Sections 5(a) and 5(b) and, second, its insistence that, despite this identical language, §5(a) *excludes* but §5(b) *includes* FTC proceedings.*

From the Solicitor General's brief, we first cull the following:

> "It must be conceded, we think, that the words of Section 5(b) do not readily encompass the present case. No one would spontaneously describe an administrative proceeding upon a complaint issued by the Federal Trade Commission as a "civil or criminal proceeding • • • instituted by the United States" or—to use the original words of Section 5(b)—as a "suit or proceeding in equity or criminal prosecution." (Govt. Bf., pp. 14-15.)
>
> • • • • • •
>
> "We recognize, of course, that if Congress had plainly indicated a desire to distinguish between the judicial and administrative proceedings with respect to the tolling of the statute of limitations, its enactment would be conclusive no matter how inadequate the basis for the differentiation might seem." (*Id.*, 21.)
>
> • • • • • •
>
> "For the purposes of the present case we may assume that the court below erred in concluding that a Federal Trade Commission order is a 'final

* " 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' " (Lewis Carroll, *Through the Looking Glass*, Ch. VI.)

judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States.'" (*Id.*, 32.)

* * * * *

"* * * Congress might well have concluded as a matter of substantive policy that it was unwise to give *prima facie* effect to an order made without regard to the rules of evidence in the comparatively free and untried administrative proceedings of the proposed new Federal Trade Commission. In this context there are important differences between judicial and administrative proceedings." (*Id.*, 34-35; Cf. 17.)

* * * * *

"* * * the real thrust of our argument is that the exact meaning of the phrase ['civil or criminal proceeding * * * by the United States'] need not be decided because the underlying policy is applicable to Federal Trade Commission proceedings whether the language covers them or not." (*Id.*, 35.)

These comments then lead the Solicitor General to incorporate in his conclusion the candid admission that the result below "is difficult *and perhaps impossible* to justify in terms of conventional analysis of the text and legislative history * * *" (*Id.*, 39-40; emphasis supplied.)

These concessions notwithstanding, this Court is nevertheless urged by the Government to approve the bald judicial legislation achieved below.* In short, the statute itself, the pertinent legislative history, judicial precedent and the understanding and acquiescence of Congress, the executive branch (and its agencies) and the bench, together with the private bar and its commentators, should now yield to "the Government's view" of the law as it might better have been.

In this sense the Government's brief is clearly misdirected: it would be more appropriately addressed to

* See *e.g.*, Note, 65 Colum. L. Rev. 158, 162 (1965).

Congress which, alone, is charged with the formulation of antitrust enforcement policies. See *U. S.* v. *Cooper Corp.*, Pet. Bf., p. 71: compare, as an endorsement of "strict construction" for antitrust enforcement statutes, *U. S.* v. *Boston & Maine Railroad*, —— U. S. ——, (No. 232; March 8, 1965).*

In its broader aspects the Government's brief precisely illustrates—and in striking detail—the very dangers to which we have alluded as being inherent in selective policy-making in the adversary context of a single case Pet. Bf., pp. 47-8, 67-71. The Solicitor General has chosen to single out as paramount just one of the several concurrent, complementary and even competing antitrust enforcement policies with which Congress has concerned itself over the years. While Congress might have chosen to enact, and the Executive to endorse, that policy without regard to others, the Solicitor General has pointed to no authority to indicate that Congress so chose and concedes the force of considerable authority to the contrary. Nor is there any representation that all concerned agencies of the government actually concur in the policy selected by the Solicitor General or feel that such a policy should be judicially, rather than legislatively, proclaimed.** Under

* Surely civil treble-damage litigation is as punitive in nature (if not more so) as a criminal prosecution under Section 10 of the Clayton Act.

** For instance, the 1964 Annual Report of the Federal Trade Commission at pp. 33-4 includes an express recommendation that Congress amend §5(a) to embrace FTC proceedings. (Oddly enough, no corresponding change is proposed in §5(b) to accord tolling to FTC proceedings; nor does the FTC propose to amend §5(a)'s *proviso*. If literally adopted, therefore, the FTC's consent orders, as well as those litigated, would become prima facie evidence but only in cases instituted within §4B's four-year period—unless a specific reference to FTC proceedings in §5(a) could then be construed to apply to §5(b) as well. In view of this tangle, we are fortunate to be called upon here only to meet the Solicitor General's legislative proposals and can leave the FTC's to Congress.)

the circumstances, one might fairly question the Solicitor General's approach to our time-honored tripartite division of governmental responsibilities.

However grave may be the overtones of the Solicitor General's remarkable divination—fifty years after the event—of the Congressional purposes in adopting Section 5 of the Clayton Act, the construction now urged "in the public interest" cannot withstand analysis in several obvious particulars:

(1)

At the outset we question the rather bland assumption that, from the standpoint of "fairness" to the defendant, suspending limitations pending FTC action is of little moment since the defendant has been timely charged and actively engaged in his defense. Govt. Bf., p. 19. Certainly several factors present in this case must be ignored before we can leap to the conclusion that the otherwise salutary policy of repose has been "outweighed."

Obviously, when a Clayton Act proceeding ends in divestiture, the defendant also divests himself, often irretrievably, of the very personnel, records and other evidence most essential to his defense. 3M was required to do this in 1960 to comply with the consent order. Secondly, he is now called upon to face a punitive treble-damage action rather than divestiture (with compensation) or an order to cease and desist from practices perhaps long abandoned. Finally, as this case neatly illustrates, he may also be called upon to defend a different substantive charge than that made by the FTC.* See Pet. Bf., Point III, pp. 71-78.

* New Jersey Wood's conversion of the FTC's Clayton Act case into Sherman Act theories also came too late to implicate Essex Wire in the IWI acquisition; hence 3M is now called to account for that acquisition while its putative co-conspirator and co-monopolist is excused.

It is therefore hard to see—at least in terms of "fairness"—how a defendant with his defensive capabilities seriously impaired and facing much more drastic sanctions with different substantive offenses charged (but in this case perhaps without recourse to its alleged joint tort-feasor) has not been injured.

(2)

Perhaps even more disturbing is the further assumption—implied in the stated assumption that Congress wanted plaintiffs to have the fruits of Governmental fact-finding resources—that the mere institution of an antitrust proceeding should automatically provide prospective plaintiffs with evidence of, or "leads" to, antitrust violations. It is at this point that the Solicitor General trips over his own analysis. Congress may, indeed, prefer a determination of liability in a single "major" proceeding instituted "by (or on behalf of) the United States." However, if the government fails to establish a violation, can it truly be said that Congress wished to provide random evidence (or "leads") to plaintiffs disgruntled at the government's failure with all of the attendant burdens thrown upon the courts? Such seems to be the Solicitor General's contention but, not only does it fly in the teeth of the legislative history (see pp. 11-13 *infra*), it pre-supposes an almost illicit purpose of fomenting private litigation in the wake of an abortive government case. Thus, unless we assume with the Solicitor General that every government complaint has intrinsic merit, the principal rationale of the policy argument is seriously undercut. Only a successful government litigation prosecuted to a final judgment or decree adduces prima facie evidence; those which fail therefore yield nothing except the evidence and "leads" which the Solicitor General now finds to be the "basic"

purpose in tolling the limitations otherwise applicable to private suits. Thus, not only is there no evidence of that "basic purpose," the purpose itself is inherently unfair to a successful defendant.

(3)

Indeed, if Congress intended that private plaintiffs could use a government suit to develop underlying evidence, witnesses, legal theories and otherwise receive the benefit of the "Government fact-finding resources", why stop short of the many investigative proceedings directed to establishing violations of "the antitrust laws" such as those conducted before the Grand Jury, or under a civil investigative demand, 15 U. S. C., §§1311-1314, or pursuant to Section 6(b) of the Federal Trade Commission Act, 15 U. S. C., §46(b)? Why should not Section 5(b) come into play during the antitrust inquiries of all the agencies listed in Section 11 of the Clayton Act and such other agencies that otherwise have—or might assume—an antitrust competence?

What, meanwhile, of the neglected plaintiff whose defendant has never been the subject of any governmental "proceeding" of any nature? Is it for his case alone that Congress enacted Section 4B? If so, surely the rule (policy of repose) has become the exception (policy of preservation) and the exception, the rule.

(4)

If FTC proceedings are still not to produce prima facie evidence, tolling during pendency of those proceedings may significantly affect the agency's consent order negotiations.

In short, if the law were as advocated by the Solicitor General, there would have been little inducement here for

3M (or for any future respondent) to settle with the FTC since a respondent with a tenable defense will feel no countervailing pull toward a consent settlement. Certainly, on the Solicitor General's reading, the declared Congressional policy in favor of encouraging consent settlements in antitrust cases would be seriously eroded.

(5)

In the final analysis, what the Solicitor General would attain by a tolling policy pronounced by this Court is probably now readily attainable in most cases prosecuted within the statutory limitations concurrently with related FTC proceedings. If the policy is to be public disclosure of the evidence and "leads" developed by the agency, tolling is surely an imprecise means to that end. Clearly, an extension of Section 5(b) such as sought (or, for that matter, even outright repeal of Section 4B) would not necessarily deliver to the putative plaintiff all which the Solicitor General envisions for him. Commission rules* and its practice** permit receipt of evidence *in camera* specifically so as to protect respondents—while still presumptively in a state of innocence—from unwarranted disclosures to competitors.

(6)

It is also asserted that distinguishing FTC proceedings and Justice Department cases for Section 5(b) purposes "would introduce" troublesome and capricious distinctions. Govt. Bf., p. 20. However, since precisely that distinction has been observed for fifty years, any trouble which now develops must be laid to those who would pre-

* See the Commission's Rules of Practice §§1.132, 1.133; *cf.* FTC Act. Sec. 6(f), 15 U. S. C., §46(f).

** See discussion at 3 CCH Trade Reg. Rep'r. §9637.

sently obliterate it. Nor, as we see it, does it help to classify plaintiffs who follow up on FTC proceedings as "losing rights" which those who follow the Attorney General have by virtue of Section 5(b). We can as fairly question whether such plaintiffs should acquire or *gain* "rights" from the courts which Congress has never declared.

(7)

It is even argued on the Government's behalf that tolling should be inferred and imposed (or, more precisely, limitations should be denied) independently of Section 5(b).

The authorities cited for this argument are simply inapposite. Here the principal reliance is upon a selective reading given this Court's decision of April 5 in the *Burnett* case, —— U. S. ——, No. 437. However, the Government ignores what is clearly the principal thrust of that decision where the plaintiff, asserting rights under the "humane and remedial" FELA Act, filed suit in a competent state court only to be dismissed for improper venue after the applicable statute had run. Thus the case was readily analogized to others in which "a plaintiff has not slept on his rights but, rather, has been prevented from asserting them." Opinion per Mr. Justice Goldberg.

Glus v. *Brooklyn Eastern Terminal,* 359 U. S. 231, also cited, does not really speak to tolling but to estopping a defendant who affirmatively misleads a plaintiff as to his rights from raising the statutory bar. Nor can New Jersey Wood claim to have been prevented from instituting its suit by war or any other circumstance beyond its control. Cf. *Hanger* v. *Abbott,* 6 Wall. 532.

These authorities are unavailing so far as New Jersey Wood is concerned. Not only did this plaintiff go to bed

and slumber peacefully on after full knowledge of the event which triggered the alleged damage (Amended Cmplt., Par. 11(b), R. 51a), but 3M's position materially changed as a direct consequence of the divestiture to which it consented.

(8)

Nor may it be validly concluded that Congress in 1914 acted either capriciously or was "mistaken" in its purposes or assumptions in failing—for no apparent or "plausible" reason according to the Government—"to add words more descriptive" of FTC proceedings to Section 5(b). Govt. Bf., p. 10. Indeed, Congress had several reasons to exclude FTC proceedings from tolling that are quite apparent and quite plausible: more pertinent, they are most compelling.

First, the inclusion of FTC proceedings within Section 5 in 1914 would have suspended limitations indefinitely whenever the FTC moved to enforce the Act since, until the 1959 Finality Act, FTC orders were always open to review at any time. Thus, since the time for appeal never ran, some rule different from that prevailing for court cases* would have had to be devised if tolling was itself ever to end.

Second, while Congress clearly intended treble-damage claimants to have the use of favorable judgments, it just as clearly did *not* intend that, regardless of the admissibility of the judgment, they should have the use of evidence and "leads" discovered by the Justice Depart-

* *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 857-8 (8th Cir., 1952); *Electric Theatre Co.* v. *Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937, 944 (W.D. Mo., 1953).

ment, let alone the FTC, particularly when developed in unsuccessful prosecutions. See Pet. Bf., 63-5. Perhaps Congress *could* have adopted the latter policy and it may also be true that, when limitations are suspended for judicial proceedings, these broader benefits *might* become available to treble-damage claimants. But the Government's facile assumption that these incidental—and only occasional—consequences of the tolling provisions are themselves "the *basic* purpose of the tolling provision" (Bf., 18-19) is directly repudiated by the legislative history.

Had Congress truly desired "to give the private suitor the benefit of the government's fact-finding resources" (Govt. Bf., p. 19), the most direct way to accomplish this would be to open the files of the Justice Department (and the FTC, ICC, FRB, etc.) to prospective private suitors. However, an amendment to the Clayton Act doing just that was introduced and withdrawn under fire. This deliberate refusal by Congress to open the government's files was thereafter noted several times in debate. See Reynolds' brief, pp. 76, 79-80.

Finally, although the Government's suggestion (Bf., 23) that the language of §5(b) "was not chosen with a view to discriminating" between judicial suits and administrative proceedings "since the latter had not yet been authorized" may be arguably true in respect to the initial House draft,* it is demonstrably false as to the Senate committee's draft and every subsequent version. The Senate committee added the provision—now extant as

* The contention, however, does overlook the facts that the FTC Act creating the Trade Commission was under debate at the same time as the Clayton Act; that the ICC had been in existence since 1887; and that the Federal Reserve Board had existed since 1913. All three agencies were, of course, encompassed in what became Section 11 of the Clayton Act.

Section 11—giving enforcement powers to the FTC, the Interstate Commerce Commission and the Federal Reserve Board (and, eventually, to other administrative agencies). 15 U. S. C., §21. At the same time and with knowledge of that provision, the Senate committee, without amending the term "United States," did offer two changes in Section 5(b) which, by their acceptance, conclusively demonstrate that its language was deliberately designed to exclude any such administrative proceedings from the reach of the tolling provision.

First, the Senate committee inserted "any criminal prosecution" into the description of the proceedings which would toll limitations but carefully refrained from adding the newly authorized administrative proceedings. Second, the committee deliberately deleted from that description of those proceedings the words "on behalf of" thus limiting the tolling effect to proceedings brought "by the United States." See Pet. Bf., p. 18n. This change might well have been made because the committee feared the new FTC enforcement procedures might erroneously be deemed to be proceedings "on behalf of" the United States so as to toll the statute of limitations. See Reynolds' brief, 94-95. Significantly, the Government fails to suggest any other "plausible reason" for this change in language and, presumably for the lack of such a reason, omits this from the "significant changes" catalogued in its Brief, page 24, note 6.

With Respect to Respondent's Views . . .

(1)

New Jersey Wood also argues, like the Solicitor General, that the tolling provision of Section 5 is broader than the prima facie evidence provision and, hence, encompasses an

FTC proceeding. However, here principal reliance is upon *Union Carbide and Carbon Corp.*, v. *Nisley*, 300 F. 2d 561 (10th Cir., 1962), and the Senate report on the 1955 amendments to Section 5(b) rather than upon grounds of legislative policy. Resp. Bf., pp. 9-10."*

These authorities, however, contain nothing to support respondent's contention that an FTC proceeding can toll the statute of limitations. As we concede (Pet. Bf., pp. 65-7), Sections 5(a) and 5(b) may not be "co-extensive"; yet the variance in the statute's subsections cannot logically support New Jersey Wood's argument. Certainly the *Union Carbide* opinion in the very language respondent quotes (Bf., p. 11) expounds the converse of New Jersey Wood's proposition by accepting the traditional view that the "corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the *intended benefits* of related government proceedings" and then defining "intended benefits" as "making available to [private suitors] all matters previously *established* by the Government in antitrust actions." Since facts that provide the foundation for a "judgment or decree" are the only facts ever *established* in any suit, it is obvious that the Tenth Circuit considered that tolling was intended to provide time to await a "judgment or decree" in a judicial proceeding.

Sen. Rep. 619, on the other hand, simply sets forth the reason for adding a year following termination of a Government proceeding to the period of tolling and has nothing whatsoever to do with whether administrative proceedings can toll the statute.

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* New Jersey Wood's other effort in these pages (Bf., pp. 8-17) is to distinguish our contrary cases.

(2)

That what we have termed the "exclude/include" reading of identical words in Section 5 so wishfully sought by New Jersey Wood (and endorsed by the Solicitor General) lacks any foundation either in statutory language or legislative history is evident from the fact that neither New Jersey Wood nor the Solicitor General attempts to state when such a plastic concept became part of the Congressional purpose. We have had FTC Clayton Act proceedings since 1914 but, by avoiding any argument that such proceedings could toll before the Finality Act, New Jersey Wood tacitly concedes that, between 1914 and 1959, rights of private plaintiffs did depend on whether the Justice Department or the FTC commenced a proceeding. Respondent must likewise concede that, in all that time, no court held or implied that Section 5 was rendered unconstitutional by this disparity (Cf. Res. Bf., pp. 33-4).

New Jersey Wood quotes (Bf., p. 9) language from the Third Circuit opinion which may state an argument that an "exclude/include" construction became Congressional policy in 1955. Any argument based on the 1955 amendment, however, still faces the objection that FTC proceedings were not yet final; hence any tolling would be indefinite and for an indeterminable period, a "wholly artificial" result in the government's view (Bf., p. 33).

Such an argument must also acknowledge the fact that the only Congressional references to FTC proceedings during the years when the amendments adopted in 1955 were being debated indicated definitely that FTC proceedings were outside the scope of Section 5 and that no change was intended. See Pet. Bf., pp. 35-41. Congressman Celler later expressly agreed with a statement by the FTC's then Chairman that Section 5 is "never

applied in any event in a Federal Trade Commission case because the courts have held that our orders entered after full trial are not admissible."*

As for the 1959 Finality Act, neither New Jersey Wood nor the Solicitor General uses that amendment to Section 11 to support the "exclude/include" theory of construction they propose for Section 5. New Jersey Wood asserts that the attribute of finality, once provided, was sufficient to bring FTC proceedings and orders within both the prima facie evidence and the tolling provisions in line with the rationale of the original opinion in *Brunswick* (Resp. Bf., pp. 24-8); the Solicitor General, on the other hand, acknowledges that, in making FTC orders final, Congress did not make them "judgments or decrees" capable of constituting prima facie evidence and that the Third Circuit therefore erred in its contrary construction of Section 5(a). Govt. Bf., pp. 32-4.

Nor apparently does the Solicitor General find any indication in the legislative history of the Finality Act that FTC proceedings were intended to toll the statute of limitations. Legislative history preceding the Finality Act states as clearly as such chronicles ever do that the Act was intended to be merely procedural without making any substantive changes in law. See Pet. Bf., pp. 41-4.

With a theory of statutory construction lacking any support in the words of the statute or the Congressional

* *Hearings on Current Antitrust Problems Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 3 pt. 3, at p. 2355 (1955). Of course, so far as we know, Representative Celler has never been accused of being soft on antitrust enforcement. (Mr. Celler's comment, it is interesting to note, was, in turn, offered in agreement with the testimony of FTC Chairman Edward Howrey who, at the time, was accompanied by his executive director, Mr. Alex Akerman, whose brief *amicus* in this case takes just the opposite view from that of his Chairman in 1955.)

history, it is only candid to argue as respondent and the Solicitor General do that Section 5(b) is "readily severable" from Section 5(a) but that argument falls far short of proof that Congress, in fact, ever distinguished the two paragraphs of Section 5.

Congress, we submit, confined its innovations—and, hence, its discussions—to modifying traditional concepts of estoppel by authorizing the use of Government adjudications as prima facie evidence without mutuality. Tolling was simply a necessary concomitant—or "handmaiden"—if this extraordinary enforcement device was to enjoy full efficacy.

By Way of Addendum . . .

(1)

In Point II (Govt. Bf., pp. 36-39) the Solicitor General argues that New Jersey Wood's Sherman Act claims are based "in part" on "matters complained of" in the FTC's Clayton Act proceeding and that, therefore, limitations were suspended with respect to those claims as well. The Solicitor General considers that the tolling requirements were satisfied simply because both the Commission and New Jersey Wood "complained of" the raw fact of 3M's acquisition of IWI's assets. However, this ignores the practical fact that an antitrust defendant really faces two completely different law suits when the government and the private plaintiff found different "rights of action" on one raw fact. In this case, institution of the FTC proceeding put 3M on notice that proof would be required concerning the relevant market, market shares and other competitive factors customary in Clayton Act proceedings. On the other hand, only when New Jersey Wood tardily commenced its action more

than five years after the IWI acquisition could 3M fairly be said to know that it must marshall proof concerning meetings, conversations and other traditional indicia of Sherman Act conspiracies. Therefore, whatever may be said of the "fairness" to the defendant of tolling limitations during pendency of an FTC proceeding (Cf. pp. 6-7, *supra*) this Court should hold, with the authorities cited in Pet. Bf., pp. 72-74, that real prejudice arises when a defendant is not informed by pendency of the government proceeding of the "right of action" which a private plaintiff later seeks to maintain.

(2)

We also note that, since our main brief was prepared, there have been two additional District Court decisions respecting the ability or right of a private plaintiff to position a treble damage claim upon Section 7 of the Clayton Act. See Pet. Bf., pp. 75-6.

As matters now stand, *Bailey's Bakery* v. *Continental Baking Co.*, 235 F. Supp. 704 (D. Haw., 1964) is in alignment with *Gottesman* and *Highland Supply* in denying any such cause of action; 235 F. Supp. at 717. The unanimity of these cases is, however, somewhat counterbalanced by *Ames* v. *Bostich*, —— F. Supp. —— (S.D.N.Y., 1965; McLean, J.). That case, however, clearly errs in purporting to draw authority from the decisions below. This Court will, of course, appreciate the extent to which—and why—we have taken pains to preserve the point as an open question here.

CONCLUSION

We submit that a paramount policy of protecting delinquent plaintiffs beyond the express exception written into Section 5(b) by Congress a half-century ago has little warrant and may well operate to the impairment, if not exclusion, of the policies of encouraging government settlements, of forestalling supplemental litigation against exonerated defendants, of permitting Congress to establish the ground rules of antitrust enforcement and, of course, that of laying to rest after a prescribed period potential but dilatory claims.

Read as a whole, Section 5 of the Clayton Act clearly applies only to judicial actions by the Department of Justice. If the phrase "civil or criminal proceeding • • • by (or on behalf of) the United States" as employed in both §5(a) and §5(b) is to exclude FTC proceedings from §5(a) and include them within §5(b) it is for Congress and, with all respect, not this Court to declare it so.

The decisions below should be reversed with costs.

Respectfully submitted,

SIDNEY P. HOWELL, JR.
230 Park Avenue,
New York, New York.

CHARLES C. TRELEASE,
744 Broad Street,
Newark, New Jersey,
Attorneys for Petitioner-Defendant.

PAUL J. QUINN
EDWIN E. MCAMIS,
REGAN GOLDFARB POWELL & QUINN
New York, New York,

THOMAS J. LYONS,
St. Paul, Minnesota,
Of Counsel.